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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 1064

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines,* and STATE OF CALIFORNIA,†
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Stockton Port District prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on November 21, 1966.

*The names of the Conference member lines who are respondents herein, as set forth in their respective petitions for leave to intervene filed in the Court of Appeals, are specified in Appendix D hereto, commencing at page 81 of the Appendix.

†The State of California is appearing herein on behalf of the San Francisco Port Authority.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 369 F.(2d) 380. It is reproduced in Appendix B hereto (App. p. 6)*. The report and order of the Federal Maritime Commission which are involved herein are reported in 9 F.M.C. 12, and are reproduced in Appendix C hereto (App. p. 10), together with the dissenting opinion of Commissioner Hearn and the concurring opinion of Commissioner Patterson.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1966. The jurisdiction of this Court is invoked under Section 10 of the Review Act of 1950 (5 U.S.C. 1040) and 28 U.S.C., Section 1254(1).

III.

QUESTION PRESENTED

The question presented is the lawfulness of the practice whereby steamship carriers divert cargo from the nearest port through which it would normally move to a more distant port by the payment of the difference in land transportation charges to the respective ports.†

This question has never been decided by the Supreme Court. A similar case reached the Court of Appeals, and an order of the Federal Maritime Board ruling such practice to be unlawful was affirmed on the ground that the Board had a duty to promote and encourage the use by vessels of

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*Pages of the Appendix hereto will be cited as "App. p. 1", etc.

†For convenience this practice is hereinafter referred to as "port equalization".

ports adequate to care for the freight that would naturally pass through such ports. (*City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955); *Pacific Far East Line v. United States*, 246 F.(2d) 711 (C.A.D.C. 1957).)

IV.

STATUTES INVOLVED

The statutes involved in this case are:

Sections 15 and 16 (First) and (Second) of the Shipping Act, 1916 (46 U.S. Code Sections 814 and 815, 39 Stat. 733, 734, 75 Stat. 763);

Section 8 of the Merchant Marine Act, 1920 (46 U.S. Code Section 867, 41 Stat. 991);

Section 205 of the Merchant Marine Act, 1936 (46 U. S. Code Section 1115, 49 Stat. 1987);

Section 10(e) of the Administrative Procedure Act (5 U.S. Code Section 706 (formerly 1009), 60 Stat. 243); and

Section 551 of Title 33 of the U. S. Code (40 Stat. 1286).

Because of the length of such statutes, their text is set forth in Appendix A hereto (App. p. 1 et seq.).

V.

STATEMENT OF THE CASE

The decision and order of the Court of Appeals to which this petition is directed permit steamship conferences and steamship lines—and even foreign steamship lines—to thwart the will and intent of Congress that ports shall be used by vessels for freight that would naturally pass through them, and to determine which ports in the United States shall be used and hence prosper and which shall suffer by disuse.

This case involves a petition to review and set aside, in part, a final order of the Federal Maritime Commission (hereinafter referred to as the Commission) entered under authority of the Shipping Act, 1916 (46 U.S.C. 801 et seq.). Petitioner Stockton Port District was the complainant in the proceeding before the Commission.

The jurisdiction of the Court of Appeals was based on Sections 2 and 4 of the Review Act of 1950 (5 U.S.C. 1032, 1034).

Petitioner Stockton Port District is a public corporation and a political subdivision of the State of California, and operates the wharves and other facilities comprising the Port of Stockton. That port is located on an improvement project authorized by Congress in the San Joaquin Valley in California, 84 miles by water from the Golden Gate. (Com. Rep. 5, 22, R. 1270, 1287*, App. pp. 15-16, 37.)

Petitioner filed a complaint with the Commission pursuant to the Shipping Act, 1916 (46 U.S.C. 801 et seq.), alleging that provisions of the tariffs of the respondent conferences and their members which permit port equalization of the type hereinabove described, and the practices thereunder against the Port of Stockton, were unlawful.

The respondents in the proceeding before the Commission were three steamship conferences functioning under Section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and their respective member lines—namely, the Pacific Westbound Conference, the Pacific-Straits Conference, and the Pacific/Indonesian Conference. The lists of the member lines of these Conferences set forth in Appendix D hereto

*Pages of the Commission's Report as contained in the Record before the Court of Appeals, and the pages of the Court Record, will be indicated in this manner. The pages of the Appendix hereto where the same material appears in the Commission's Report are also indicated.

show that the Pacific Westbound Conference is composed of 22 steamship lines of which 15, or 68 percent, are foreign lines, that 9 of the 14 members of the Pacific-Straits Conference, or 64 percent, are foreign steamship lines, and that 5 of the 8 members of the Pacific/Indonesian Conference, or 62 percent, are foreign lines.

After a hearing the Commission issued a report (App. p. 10 et seq.) in which it found that the ocean freight rates of the respondent ocean carriers were the same from Stockton and San Francisco Bay ports to the Far East (Com. Rep. 3, 23, R. 1268, 1288, App. pp. 13, 38), that the inland transportation rates from the relevant area, the San Joaquin Valley, were lower to Stockton than to San Francisco and the other ports involved (Com. Rep. 11-14, R. 1276-79, App. pp. 24-27), that without port equalization much of the equalized cargo would move through Stockton (Com. Rep. 7-8, R. 1272-73, App. p. 19), and that the Port of Stockton has lost substantial revenue from terminal charges on the equalized cargo that it would otherwise have received (Com. Rep. 5, R. 1270, App. p. 16).

As a result of the port equalization by means of the payment by the ocean carriers of part of the shipper's inland transportation charges to the port of loading, the Port of Stockton has therefore lost a substantial volume of cargo which would move over that port in the absence of the port equalization.

The majority of the Commission concluded that the port equalization rules and practices were *not unlawful* in the case of port equalization against the Port of Stockton *on cargo loaded at San Francisco or any other port located on San Francisco Bay*. This conclusion was based on the Commission's finding that such port equalization was beneficial to shippers and to the ocean carriers desiring to equalize

over San Francisco Bay ports instead of sending their vessels to Stockton. (Com. Rep. 8, 20-22, R. 1273, 1285-87, App. pp. 20, 34-36.)

Commissioner Hearn filed a vigorous dissenting opinion (Com. Rep. 27A, R. 1293, App. p. 44).

The Petition for Review filed with the Court of Appeals was directed against the failure of the Commission to hold such port equalization on cargo loaded at San Francisco Bay ports unlawful.

Among the contentions advanced by petitioner before both the Commission and the Court of Appeals was that such port equalization violated the policy and intent of Congress as set forth in various statutes and certain action of Congress hereinafter indicated, and that consequently the Commission's failure to hold the port equalization unlawful on cargo loaded at San Francisco Bay ports was erroneous.

The Commission rejected this argument. In his dissenting opinion Commissioner Hearn declared:

> "I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. * * *" (Com. Rep. 28, R. 1294, App. p. 45.)

The Court of Appeals did not discuss or even mention petitioner's contention in this respect in its opinion. The Court was concerned only with the limitations of its powers to review evidentiary matters, and failed to comply with its duty to consider and decide questions of law that were presented to it.

VI.

REASONS FOR GRANTING THE WRIT

A. The Commission and the Court of Appeals Have Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

1. The Question of Federal Law.

The question of federal law here involved which has not been, but should be, settled by this Court is whether certain federal statutes and certain action of Congress establish a Congressional policy and intent that condemns, as a matter of law, port equalization whereby ocean carriers, instead of sending their vessels to load cargo at the port through which it would otherwise move, divert the cargo to another port for loading by paying the shipper the additional inland transportation charges involved in transporting the cargo to the port of loading.

The Commission concluded that the lawfulness of port equalization should be determined on the basis of whether it is beneficial to shippers and to the equalizing carriers. It found that the port equalization here involved was beneficial to shippers and to the equalizing carriers, and hence lawful. The Court of Appeals affirmed the order of the Commission. Petitioner contends that the Commission and the Court of Appeals erred in this respect, since the test applied by the Commission is a direct violation of the policy and intent of Congress hereinafter discussed.

The Port of Stockton was developed as a federal river and harbor improvement project after approval of the project by Congress (Com. Rep. 22, R. 1287, App. p. 37; River and Harbor Act of 1927, Public Law 560, 69th Congress, 2nd Session, 44 Stat. 1014). Such Congressional approval was based on a study and report of the United States Army Engineers which concluded that the development of

the Port of Stockton was economically feasible on the basis of the cargo that could be expected to move through that port because of lower inland transportation rates from the origin of the cargo, and that such port would be beneficial to the public and hence in the public interest (House Document 554, 68th Congress, 2nd Session). As a result of such Congressional approval, vast sums of federal and local public funds and private funds were spent in the development of the Port of Stockton and its waterways. Subsequent improvements of the waterways to the Port of Stockton have also been approved by Congress on the basis of similar studies and reports of the Army Engineers. (Public Law 392, 75th Congress, 1st Session, 49 Stat. 1622, House Document 15, 75th Congress, 1st Session; Public Law 296, 80th Congress, 2nd Session, House Document 752, 80th Congress, 2nd Session; Public Law 89-298, House Document 208, 89th Congress, 1st Session.)

The policy of Congress with respect to the development of ports has been declared as follows by Congress in 33 U.S. Code 551 (App. p. 5):

> "It is declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality or other public agency of the State and open to the use of all on equal terms. * * *"

The various River and Harbor Acts adopted by Congress, including those pertaining to the Port of Stockton, are an implementation of this policy.

In and by Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867), Congress has specified "the object of promoting, encouraging, and developing ports and transporta-

tion facilities in connection with water commerce", and has declared that "the use by vessels of ports adequate to care for the freight which would naturally pass through such ports" shall be promoted and encouraged. Congress has thus determined that the use of such ports by vessels is in the public interest.*

A violation of the principles of Section 8 of the Merchant Marine Act, 1920, was held by the Commission's immediate predecessor, the Federal Maritime Board, to require it to hold certain port equalization unlawful. The Board's decision in this respect was upheld by the United States Court of Appeals for the District of Columbia. In the case of *Pacific Far East Line v. United States*, 246 F.(2d) 711 (C.A. D.C. 1957), the Court of Appeals upheld the Board's decision in *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955), which held that port equalization against ports in Oregon and Washington on certain products loaded at California ports was "unjustly discriminatory and unfair as between ports within the meaning of Section 15 of the Act and detrimental to the United States *as contrary to the principles of Section 8 of the Merchant Marine Act*",† since it resulted in the diversion of traffic which otherwise would naturally pass through the complaining ports. (See 246 F.(2d) 714.) In the *City of Portland* case the Board said:

> *"Section 8 charges the Board with the duty to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports."* (4 F.M.B. 679.)

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*Section 8 of the Merchant Marine Act, 1920, is quoted in its entirety at pages 2-3 of the Appendix hereto.

†All emphasis in quotations is supplied unless otherwise indicated.

In upholding the Board's decision, the Court of Appeals relied on the policy of Congress expressed in Section 8 of the Merchant Marine Act, 1920. With respect to Section 8 of that Act the Court said:

> "While we need not decide that this section (conferring the power to investigate) confers power to act to promote ports, it is indicative of a congressional policy favoring port improvement and development. That policy having been expressed, the Board could, *if it was not bound to do so,* examine the practices here complained of in the light of that policy, and exercise its power to approve or disapprove such practices *accordingly.* The Board did consider this policy in determining whether or not to approve equalization as practiced by the Conference. We must therefore conclude that the Board's orders here under attack *were authorized and supported by statute.*" (246 F.(2d) 716.)

In our case, as in the *City of Portland* case, the port equalization diverts freight from the port through which it would otherwise naturally pass (the Port of Stockton).* Since this was held to be a violation of the principles and policy of Section 8, and hence to make the port equalization unlawful, in the *City of Portland* case, similarly here, as the Court suggested in the *Pacific Far East Line* case, the violation of the principles and policy of Section 8 should have been held, as a matter of law, to render the port equalization unlawful.

The intent of Congress that ports should be used is likewise apparent from Section 205 of the Merchant Marine Act, 1936 (46 U.S.C. 1115, App. p. 3). There Congress made it unlawful for any common carrier by water or any con-

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*In its report the Commission found: "Without equalization much of the cargo would move through Stockton". (Com. Rep. 7-8, R. 1272-73, App. p. 19.)

ference to prevent or attempt to prevent any other such carrier from serving a federally improved port at the same rates which it charges at the nearest port already regularly served by it.

Moreover, it is a matter of common knowledge that Congress has spent vast sums of public funds in developing and improving ports throughout the United States, and has encouraged the spending of local public funds to that end. Up to the time of the hearing in this proceeding the sum of $23,000,000 had been invested in the Port of Stockton, consisting of $9,800,000 by the Stockton Port District, $3,200,000 by the City of Stockton, $3,800,000 by the Federal Government, $500,000 by the State of California, and $5,700,000 by private investors. (Com. Rep. 5, 29; R. 1270, 1295, App. pp. 15, 45.) Since the hearing, in the year 1965 Congress approved a project for deepening and otherwise improving the waterways to Stockton which will involve the expenditure of approximately $61,000,000. (Public Law 89-298; House Document No. 208, 89th Congress, 1st Session.)

Before federal funds are spent on port projects, investigations are made by the Corps of Engineers of the United States Army pursuant to Sections 541 and 542 of Title 33 of the United States Code, to determine the economic feasibility of the project. Among other things, the Corps of Engineers is directed by Congress to "have in view *the amount and character of commerce existing or reasonably prospective* which will be benefited by the improvement".

The enactment of these statutes and such expenditure of federal funds establish the policy and intent of Congress that ports shall be developed and that they should be used by vessels for handling cargo that would naturally move through them. Congress has thus declared this to be in the public interest. Congress would certainly not have spent the

vast sums for developing and improving ports, and would not have encouraged others to do so, if it had intended that such ports should not be used, and it certainly did not intend that the determination of which ports shall prosper by use by vessels and which shall suffer from disuse shall be left to the determination of steamship conferences and steamship lines by means of an artificial device such as port equalization.

Yet that is exactly the result produced by the decisions of the Commission and the Court of Appeals in this case. As Commissioner Hearn said in his dissenting opinion (Com. Rep. 28, R. 1294, App. p. 45),

> "I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. * * *"

The Commission's conclusion that the lawfulness of port equalization is to be determined on the basis of whether the diversion of the cargo away from the port of the normal movement to another port is beneficial to shippers and to the equalizing carriers is a clear violation of this Congressional policy and intent, and is hence erroneous.

The Supreme Court has never considered the question of the lawfulness of port equalization of the type involved here. For the reasons set forth hereinafter it is important that this Court consider this question and decide whether—as the Court of Appeals for the District of Columbia suggested in *Pacific Far East Line v. United States*, supra—the policy and intent of Congress with respect to the development and use of ports must be obeyed by the Commission, and require it to conclude that port equalization which violates the Congressional policy and intent is contrary to the

public interest in violation of Section 15 of the Shipping Act, 1916 (46 U.S.C. 814) and results in unjust discrimination and undue preference and prejudice between ports in violation of Sections 15 and 16 (First) of that Act (46 U.S.C. 814, 815).

2. Importance of the Question.

Although the decision here involved applies directly only to the Port of Stockton, the principle of the decision affects every port in the United States and is highly important to every port.

The decision of the Commission, which has been affirmed by the Court, holds that the lawfulness of port equalization is to be determined by the Commission on the basis of whether the port equalization under consideration, in the opinion of the Commission, is beneficial to shippers and to the ocean carriers desiring to equalize.

Actually where port equalization would be employed by the ocean carriers, it would benefit them by saving the cost of sending their vessels to the port equalized against, and the shippers whose cargo was equalized would be benefited by paying no more for their transportation than to the cheapest port and by having the service of additional steamship lines available and in some instances having their cargo loaded at the last port of call. Under the principle of the decision here involved, therefore, the Commission could be expected to hold the port equalization lawful, and the fate of every port in the country is therefore in the hands of the steamship conferences and the steamship lines, and indeed even foreign steamship lines, depending on whether they decide to practice port equalization against a particular port or not. In this connection it should be noted that the Commission found that when the Conference tariff permits

port equalization, "carriers find that competition compels them to equalize". (Com. Rep. 8, R. 1273, App. p. 19.)

We submit that the Commission's test of lawfulness is an incorrect interpretation of the law which would place the vast investment in every port in the country in jeopardy, since no port would ever know whether or when ocean carriers would institute the practice of port equalization against it and whether the Commission would hold such equalization lawful. Not only would the servicing of outstanding bonds issued for port development be in serious jeopardy, but the advisability of spending additional sums for port improvement and for the development of new ports would be highly questionable—all clearly contrary to the intent of Congress.

Since this Court has never considered this type of port equalization, it is very important to the ports throughout the country that this Court consider this matter and determine whether the statutes and Congressional action hereinabove mentioned establish a Congressional policy and intent which make such port equalization unlawful.

B. The Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

This case involves a "Petition for Review of an Order of the Federal Maritime Commission" which was filed with the Court of Appeals for the Ninth Circuit. Among other things, petitioner presented to the Court of Appeals the question of law which is discussed hereinabove—namely, whether the statutes and action of Congress mentioned preclude the Commission, as a matter of law, from holding that the port equalization in question is lawful.

Under Section 10(e) of the Administrative Procedure Act (5 U.S.C. 706 (formerly 1009), App. p. 4), a question of law is one of the specified grounds of judicial review. In fact that section provides:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions * * *."

The Court of Appeals failed to comply with this "accepted and usual course of judicial proceedings". It did not review the Commission's decision in the manner required by law. Its opinion shows that in denying the petition for review the Court did not interpret the statutory provisions hereinabove cited which were presented to the Court and it did not decide the presented question of law of whether the statutes and action of Congress hereinabove mentioned establish a Congressional policy and intent that render the port equalization here involved unlawful.

The decision relied upon by the Court primarily in its opinion (App. p. 7), *Consolo v. Federal Maritime Commission*, 386 U.S. 607 (1966), is not in point in this connection. That case did not involve a question of law, as is here involved, but only the question whether there was substantial evidence to support the Commission's decision. This is apparent from the fact that in specifying the scope of authorized judicial review in the *Consolo* case, the Supreme Court omitted the portion of Section 10(e) of the Administrative Procedure Act which authorizes review of questions of law, and mentioned only the substantial evidence portion.

The other case cited by the Court of Appeals, *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission*, 314 F.(2d) 928 (C.A. 9th, 1963), likewise involved factual matter, since the Court held that the Commission could construe certain words in a conference agree-

ment "in the light of the record which was before the Commission". (Page 935.)

The Court of Appeals departed from the accepted and usual course of judicial proceedings in concluding that the Commission's conclusions have "a reasonable basis in law" without even discussing the important legal question which petitioner had raised with respect to the effect of the Congressional policy and intent on the lawfulness of equalization. Such departure by the Court of Appeals from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

Petitioner is entitled to have this important question of law decided by a court. Since the Court of Appeals did not mention this question in its opinion and did not decide it, the Supreme Court should consider this case and should decide this question of law.

VII.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 13, 1967.

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit upon counsel for all respondents in this proceeding by mailing, by air mail, postage prepaid, three copies thereof to each of the following:

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Dated at San Francisco, California, February 13, 1967.

J. RICHARD TOWNSEND
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Stockton Port District

(Appendices A, B, C and D Follow)

Appendix A

STATUTES INVOLVED

1.

Section 15 of Shipping Act, 1916 (46 U.S. Code 814, 39 Stat. 733, 75 Stat. 763).

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation

of this Act, and shall approve all other agreements, modifications, or cancellations. * * *"

2.

Section 16 (First) and (Second) of Shipping Act, 1916 (46 U.S. Code 815, 39 Stat. 734)

"* * * * * * *

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

* * * * * * *"

3.

Section 8 of Merchant Marine Act, 1920 (46 U.S. Code 867, 41 Stat. 992)

"That it shall be the duty of the board, in cooperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and

the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law."

4.

Section 205 of Merchant Marine Act, 1936 (46 U.S. Code 1115, 49 Stat. 1987)

"Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any com-

mon carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it."

5.

Section 10(e) of Administrative Procedure Act (5 U.S. Code 706 (formerly 1009), 60 Stat. 243)

"SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by

any party, and due account shall be taken of the rule of prejudicial error."

6.

Section 551 of Title 33 of U.S. Code (40 Stat. 1286)

"It is declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, constructed, owned, and regulated by the municipality or other public agency of the State and open to the use of all on equal terms. The Secretary of the Army, through the Chief of Engineers, shall give full publicity, as far as may be practicable, to this provision."

Appendix B

Opinion of United States Court of Appeals for the Ninth Circuit

United States Court of Appeals
for the Ninth Circuit

No. 20,544

Stockton Port District,
Petitioner,

vs.

Federal Maritime Commission and United States of America,
Respondents.

[November 21, 1966]

On Petition for Review of Order of the Federal Maritime Commission.

Before POPE, BROWNING and DUNIWAY, Circuit Judges.

Per Curiam.

This is a petition to review an order of the respondent Federal Maritime Commission. Petitioner filed a complaint before the Commission naming Pacific Westbound Conference, the Pacific Straits Conference, the Pacific/Indonesian Conference, and individual members of the Conferences, as respondents. The complaint alleged that certain port equalization provisions in the tariffs of such Conferences were unlawful and void when applied against the Port of Stockton. After finding that certain of the port equalization provisions were unlawful, the Commission held that the port

equalization rules and practices of these Conferences were not unlawful in the case of port equalization against the Port of Stockton on cargo loaded at San Francisco or any other port located on San Francisco Bay, and entered an order accordingly. It is this portion of the order which petitioner asks us to review and set aside.

The report, opinion and order of the Commission are entitled No. 1086 Stockton Port District v. Pacific Westbound Conference et al., Decided September 28, 1965, and are reported in 9 F.M.C. 12, where the facts, the contentions of the parties, and the rulings of the Commission are fully set forth. We deem it unnecessary therefore to recite these matters in the opinion of this court.

As we approach this matter we bear in mind the limitations upon our powers as a reviewing court to substitute our judgment or discretion for that of the agency. These were set forth recently in the case of Consolo v. Federal Maritime Comm'n., 386 U.S. 607, 619-621, as follows: "Section 10(e) of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. § 1009(e) (1964 ed.)) gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . .' Cf. United States v. Interstate Commerce Comm'n, 91 U.S. App. D.C. 178, 183-184, 198 F. 2d 958, 963-964, cert. denied, 344 U.S. 893. We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292,

300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Labor Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F. 2d 18, 21.

Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency."

This court had occasion to make notation of the same limitations in Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n., 314 F. 2d 928, 935, where, citing decisions of the Supreme Court, we said: "The Commission was an administrative body set up for the purpose of dealing administratively with the problems presented from time to time under the Shipping Act. Its function in this respect was not unlike similar functions performed by the National Labor Relations Board, the Federal Communications Commission, and other commissions created by act of Congress. It has long been recognized that such an administrative body has a broad discretion in effectuating the policies

of the Act creating the Commission to determine whether certain statutory requirements apply to certain individuals or groups. In making those decisions such administrative bodies are not limited by common law concepts. The question always is whether the determination of the board or commission has '"warrant in the record" and a reasonable basis in law.' National Labor Relations Board v. Hearst Publications, 322 U.S. 111, ..."

In our view the very complete and elaborate decision of the Maritime Commission discloses that its conclusions do have warrant in the record, a reasonable basis in law, and are supported by substantial evidence.

The petition for review is denied and the order of the Commission is affirmed.

Appendix C

Report and Order of Federal Maritime Commission

S E R V E D

September 24, 1965

FEDERAL MARITIME COMMISSION

Federal Maritime Commission

NO. 1086

STOCKTON PORT DISTRICT

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

Respondents' equalization rules, and practices in accordance therewith, found to be unjustly discriminatory and unfair to terminal ports of the San Francisco Bay area (which include Stockton), within the meaning of section 15 of the Shipping Act, 1916, to the extent that they provide for equalization of inland transportation against such ports on cargo loaded at Los Angeles and Long Beach, California.

Filed equalization rules of respondents operating under approved conference agreements, and practices in accordance therewith, to the extent that they provide for equalization of inland transportation charges between San Francisco Bay area ports (which include Stockton), found not to be in violation of sections 15, 16 First, 17 or 18(b) of the Shipping Act, 1916, or to be unjustly discriminatory or unfair, detrimental to the commerce of the United States, or contrary to the public interest, within the meaning of section

15 of said Act, if clarified as required; found not to violate the principles and policies of section 8 of the Merchant Marine Act, 1920; and not shown to be in violation of section 205 of the Merchant Marine Act, 1936.

Respondent Pacific Westbound Conference and its members found not to be in compliance with section 18(b) of the Shipping Act, 1916, by reason of so-called "equalization" on citrus fruit originating in Southern California and shipped from San Francisco, which is not in accordance with or pursuant to filed equalization rule.

J. Richard Townsend and *Walter H. Meryman* for Stockton Port District, complainant.

Edward D. Ransom and *Gordon L. Poole* for Pacific Westbound Conference and members, respondents.

Leonard G. James, Robert L. Harmon and *F. Conger Fawcett* for Pacific Straits Conference, Pacific/Indonesian Conference, and their members, respondents.

Stanley Mosk and *Miriam E. Wolff* for San Francisco Port Authority, intervener.

Wm. Jarrel Smith, Jr. and *Robert J. Blackwell* for Hearing Counsel, intervener.

REPORT

By the Commission: (John Harllee, Chairman; Ashton C. Barrett and James V. Day, Commissioners)

This proceeding arose upon the complaint of Stockton Port District against the Pacific Westbound Conference, the Pacific Straits Conference, and the Pacific/Indonesian Conference. The complaint alleges, in general, that the agreements of these conferences and the conference tar-

iffs, which permit port equalization, are prejudicial to the Port of Stockton and contrary to various statutory provisions. Stockton urges the Commission to order the respondent conferences to delete the port equalization rules from the conference tariffs and to cease and desist from the practice of port equalization.

Port equalization, under the respondent conferences tariffs, permits conference carriers to equalize inland transportation costs between terminal ports. Thus, under the tariff rules, a carrier may reimburse a shipper for the difference between the shipper's inland transportation costs to the nearest terminal port and the shipper's inland transportation costs to the terminal port of loading. For example, if from the point of origin of the cargo it will cost the shipper 34 cents per hundred pounds to ship overland by common carrier to the Port of Stockton and 42 cents per hundred pounds to ship overland by common carrier to the Port of San Francisco, the ocean carrier may take the shipment at San Francisco and "equalize" the added inland cost by reimbursing the shipper for the excess of 8 cents per hundred pounds which it has cost him to ship via San Francisco instead of Stockton.

Stockton alleges that the port equalization rule results in diversion of volumes of cargo normally tributary to Stockton. This is allegedly contrary to the purposes and policies of section 8, Merchant Marine Act, 1920, and section 205, Merchant Marine Act, 1936. Furthermore, Stockton asserts that the rule and its implementation are agreements unapprovable under section 15, Shipping Act, 1916; that the rule is discriminatory and unreasonable in violation of sections 16 and 17 of the Shipping Act; and Stockton urges that the conferences have violated section 18(b) of the Shipping Act by departing from their conference tariffs.

FACTS

The Conference and the Port Equalization Rule

The Pacific Westbound Conference (PWC), organized in 1923, has at present a membership of 28 common carriers. PWC serves the trade outbound from the Pacific Coast of the United States to destinations in the Orient, principally Japan, the Philippines, and Hong Kong. In 1962, PWC members made 1240 sailings, each representing a vessel calling at one or more Pacific Coast ports and clearing for a destination in the Orient.

The Pacific Straits Conference operates from Pacific Coast ports to Singapore, Malaya, Sarawak, North Borneo, and Brunei. The Pacific/Indonesian Conference operates from Pacific Coast Ports to Indonesia.

PWC sets ocean rates which apply without reservation from terminal ports. Terminal ports are those at which PWC members accept cargo for loading at the base rates named in the PWC tariff. Terminal ports in California are Stockton, Richmond, Oakland, Alameda, San Francisco, Los Angeles, Long Beach, San Diego, and Sacramento.[1]

The port equalization rules apply to terminal ports only and the rules presently in effect for respondents are set forth in the attached appendix.

Whenever cargo is equalized, the shipper must submit to the member booking the cargo the transportation bill covering the movement from point of orgin. In turn, the carrier must submit the information to the conference for certification of the basis for the equalization. Although the

1. Sacramento is not a terminal port in the Pacific Straits or Pacific/Indonesian Conferences. Service at Sacramento in these conferences is subject to a tonnage restriction of a minimum of 500 tons from one shipper.

tariff requires use of an approved form, only one of the PWC members uses the form at present; the others provide the actual source documents. The documents include information sufficient to disclose the point of origin, date of shipment, commodity, nearest terminal port, port of loading, information regarding the inland freight rates, and the inland freight bill. The conference office endeavors to check the rates contained in the source documents. This check is particularly necessary on the constructive leg of the equalization; i.e., the rate from the point of origin to the nearest terminal port. For the actual leg of the equalization, the conference uses the inland transportation bill for the actual routing of the cargo.

The conference is familiar with the rates involved in the equalization of the more important cargoes and it checks to see if the rates and equalization are reasonable. Upon encountering a questionable item, the conference refers to an inland freight tariff or telephones a trucking company or railroad. The conference is aware of the trucking company that actually carried the cargo, and they use the actual transportation costs.

For the constructive leg of the equalization, the conference uses the lowest common carrier rates to the nearest loading port. In this context, nearest means cheapest.

The claims for equalization and the supporting documents are generally submitted to the conference fairly soon after the vessel has sailed, but certain of the conference members may accumulate equalization claims for a week to two weeks. There is no conference rule regarding the time within which claims must be presented. Equalization cannot be paid until approved by the conference.

In addition to the privilege to equalize, the PWC tariff permits transshipment. Under transshipment, the shipper delivers the cargo to Stockton, the carrier accepts the

cargo and issues a negotiable document, and thereafter for its convenience and at its own expense the carrier may move the cargo to San Francisco for loading on the vessel. The cargo may be handled by truck, rail, or barge; however, it is predominantly moved via truck. Generally, only commercial general cargo is transshipped from Stockton. In the case of transshipment the steamship carrier is obliged to pay the inland freight as well as the terminal charges at both Stockton and San Francisco. Usually transshipment is limited to smaller tonnages, particularly where there is insufficient cargo at Stockton to justify a call, or some operational reasons make it impossible to make an intended call. There is no cost to the shipper for transshipment.

The Port of Stockton

The Stockton Port District is a public corporation formed pursuant to the *Harbors and Navigation Code of California*. The Port District operates terminal facilities owned by the Port District or the City of Stockton. The port consists of 10 general cargo berths, one of which is open with two 30-ton gantry cranes, two bulk docks, and one bulk grain dock. The general cargo berths are marginal-type wharves on concrete pilings with corrugated steel transit sheds. Adjoining the transit shed area, are warehouse facilities, a cotton compress, cotton warehouse, a bulk wine terminal, and a grain elevator. Stockton also leases from the Navy two berths and one transit shed on Rough and Ready Island. In the immediate area is a basin in which vessels calling at Stockton turn around, after discharging or loading cargo, to proceed downstream. At the beginning of 1964, a total of $23,000,000 had been invested in the Stockton facilities. The Port of Stockton is reached via the Stockton Ship Channel, a journey of some 75 nautical miles

(or 84 statute miles) from the Golden Gate. The channel, a Congressional project, was approved August 26, 1937. The average transit time from San Francisco Bay to Stockton via the channel is 7½ to 8 hours not taking into account delays due to fog or bridge liftings. The channel is at least 30 feet deep at mean low water. Although there are occasional groundings and delays due to fog, the conditions of the channel are satisfactory and not a serious factor in preventing a vessel from calling at Stockton. The largest cargo vessels of PWC can call at Stockton without unusual difficulty.

On August 1, 1957, PWC made Stockton a full terminal port, and since this time Stockton has had a phenomenal growth. Equalization did not affect Stockton until it became a full terminal port.

Impact of Equalization on Stockton

Stockton claims a loss of revenue to the port by virtue of equalization during 1962 of $232,000. The port lost revenue from its terminal charges—service and facilities charge, wharfage, truck unloading, dockage, and pre-palletization. Very little additional labor would be needed to accommodate this cargo insofar as wharfage and dockage are concerned, but the service and facilities charge has a considerable amount of labor. Most of the charge for truck unloading, line handling, and pre-palletization is labor costs.

Service at Stockton

During 1962, 85 vessels of respondent conferences made actual calls at Stockton and many of these lifted general cargo. In contrast, vessels of members of the Pacific Coast European Conference made 227 calls at Stockton in 1962

and lifted 260,000 tons of cargo. Of the lines calling at Stockton only OSK makes Stockton its last port of loading outbound. "K" Line made its first call at Stockton in June 1962 and made fairly regular calls thereafter. Pacific Far East Line (PFEL) operates 9 vessels in the PWC trade and practically all sailings have Stockton calls. PFEL discharges cargo at Stockton on all voyages, but export cargo is ordinarily not available at the time of the inbound call. About one-half of PFEL's outbound vessels call at Stockton, principally for bulk bottom cargoes in parcel lots. These bulk cargoes are at least 75 percent safflower seed, but from time to time include wheat and barley. They are loaded at Stockton Elevators. When the vessel calls for bulk, if there is sufficient general cargo available, the vessel will shift to a general cargo berth to load. PFEL made 30 calls at Stockton in 1962; however, Stockton is not the final port of loading in the PWC trade for PFEL. PFEL does consider itself to have a regular outward service at Stockton.

American President Lines (APL) had 24 calls at Stockton in 1962, five discharged cargo only and 12 loaded bulk only. In the first half of 1963, APL guaranteed shippers that vessels would call at Stockton regardless of the amount of cargo offered, but the plan proved to be uneconomical and was dropped. APL's service at Stockton definitely depends upon the availability of bottom cargoes, and Stockton is not the last loading port for APL vessels.

N.Y.K. Line provides no regular service at Stockton. Diado Line had 4 calls at Stockton in 1962 and United Philippine Lines had none. States Steamship Company had 4 calls in 1963 which loaded bulk rice and some general cargo.

Of the PWC members, 15 made at least one call at Stockton during 1962; 13 made no calls. PWC made a total of

133 calls, but of those no commercial general cargo[2] was loaded on 90 calls.

Vessels loading at Stockton generally can load commercial and military cargo at the same berth, but vessels loading bulk must shift to a different facility to load other cargo. The shift costs about $300 for pilot and tug.

Steamship Costs and Operational Factors Pertaining to Calls at Stockton

As noted above, it is an 8-hour trip in each direction to reach Stockton from the bay area. Thus, a carrier incurs additional expenses in steaming to Stockton, including transiting time, pilotage, tugs, and other incidental expenses. Estimates of the total of these costs range from $3,000 to $4,000.

There may be insufficient cargo to justify a call, and that cargo, for operational reasons, would be equalized or transshipped. It depends on the commodity as well as the volume to determine whether a Stockton call is justifiable. Amounts ranging from 250 tons to 750 tons might justify a call dependent on the nature of the cargo.

It is also not operationally feasible to call at every terminal port. This is particularly so of lines that have European or East Coast cargo aboard and merely top-off on the West Coast before proceeding to the Orient. Such lines would usually call at one terminal for relatively small amounts of cargo. There is an operational saving by consolidating cargo at one terminal.

Equalization gives the vessel latitude in loading and scheduling and the flexibility to avoid uneconomical calls. Equalization rather than transshipment is the better way

2. In this context, commercial general cargo means packaged, high-rated items, not bagged fertilizer and other low-rated items.

to achieve this latitude and flexibility. Equalization, which averages about $2.00 to $2.50 per ton, is substantially cheaper than transshipment. Transshipment is roughly 3 times more expensive.

Impact of Equalization on Carriers and Shippers

In spite of the operational factors encouraging equalization, certain carriers and shippers are opposed to the rule, as presently practiced. PFEL feels the rule is detrimental to its interest since it is one of the few PWC members calling regularly at Stockton, and equalization dilutes cargo tributary to Stockton. Without equalization much of the cargo would move through Stockton and, of course, PFEL would have vessels available. PFEL feels that equalization should only expedite vessel operations, but a carrier with no intention of calling at Stockton should not be permitted to equalize. If a carrier does not call regularly at Stockton and has no intention of serving the port, then PFEL feels it should not be able to equalize. Although equalization is optional under the tariff, carriers find that competition compels them to equalize.

Some shippers also wish to have the Port of Stockon continue with adequate service. Some shippers believe that if they can ship cheaper via Stockton, then they should be permitted to do so, and feel that without equalization there would likely be enough cargo to generate sufficient service. Certain shippers also feel that if the steamship companies were not burdened with equalization expenses, they might adjust the rates. At any rate, shippers like to have Stockton available for use if convenient. Some shippers apparently experience some difficulty with equalization by virtue of delay in being paid and by additional clerical expense.

Other shippers, however, for several reasons, strongly favor port equalization. To them regularity of service is highly important as is the in-transit time of the shipment, and these shippers prefer to put their cargo aboard at the last loading port. The shorter the in-transit time, the quicker the shipper is paid by his customer. Minimum in-transit time is also critical when the commodity is perishable.[3] By equalizing, shippers have access to more frequent service at no additional expense. Of course, some shippers do not care whether Stockton is the last loading port.

Service is unquestionably adequate at San Francisco. However, adequacy of service at Stockton is dependent upon the needs of particular shippers. Some shippers consider the Stockton service inadequate to meet overseas commitments.

Transshipment, from a shipper's point of view, is no substitute for equalization because of delay and damage occasioned by rehandling.

Shippers in the PWC are confronted with one reality: the Japanese are insistent upon nominating vessels upon which many consignments are to be shipped and, thus, if the nominated vessel is not calling at Stockton, then the shipment is equalized against Stockton and exported through some other terminal port. One raisin supplier indicated that service at Stockton was adequate and that many shipments would move from Stockton but for the foreign nomination of vessels.

PWC Fidelity to the Equalization Rule

The record discloses a number of departures from strict adherence to the equalization rule. However, the only substantial disregard for the rule involves equalization on

3. If there were no equalization, many perishable commodities would still move through San Francisco rather than Stockton.

citrus fruit. On citrus fruit the conference approves equalization of $.15 per carton irrespective of the point of origin, the nearest terminal port, or the inland transportation costs. The $.15 per carton equalization is the excess of the quoted base price at the dock in San Francisco over the dock-side price in Los Angeles. This is not in accord with the PWC tariff.

Citrus fruit originates in Central and Southern California. Some of the citrus originates in areas tributary to Stockton on the basis of inland transportation costs. However, no citrus is equalized against Stockton, although the $.15 payment is made on shipments originating in an area tributary to Stockton.

Discussion and Conclusions

Examiner Walter T. Southworth concluded that equalization as practiced by respondents against Stockton was lawful under the Shipping Act, 1916, but that respondents' equalization on cargo loaded at Long Beach and Los Angeles was unjustly discriminatory and unfair to terminal ports in the San Francisco Bay area (including Stockton). The examiner further found that the so-called equalization on citrus fruit failed to comply with the requirements of section 18(b) of the Act. The proceeding is before us on exceptions to the Initial Decision.

Stockton contends that insofar as the examiner found respondents' equalization against the port of Stockton lawful he was in error. Exception is taken to each and every finding and conclusion upon which this portion of the Initial Decision is based and, in actuality, Stockton's exceptions on this issue constitute nothing less than a reargument of its position before the examiner. For the reasons set forth herein we agree with the conclusions of the examiner and,

if in stating those reasons we fail to treat any "specific exception," it has nevertheless been considered and found not justified.

The equalization here in question is said to (1) discourage the use of the Port of Stockton in violation of the principles and policies of section 8 of the Merchant Marine Act, 1920,[4] with resultant violations of sections 15 and 17 of the Shipping Act,[5] (2) result in unjust discrimination and undue prejudice against Stockton, and grant undue preference to the ports where cargo is loaded (particularly San Francisco, Wilmington, and Long Beach) in violation of sections 15, 16 and 17 of the Shipping Act. In addition, Stockton urges so-called "other grounds of unlawfulness." These "other grounds" will be treated after disposal of what we consider to be the principal issues.

The examiner concluded (1) that the ports of San Francisco and Stockton were of the same harbor complex or geographical area and that equalization between ports in the same geographical area was not contrary to the prin-

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4. Section 8 of the 1920 Act directs the Secretary of Commerce in conjunction with the Secretary of the Army—

> ". . . with the object of promoting, encouraging and developing ports and transportation facilities in connection with water commerce . . . to investigate territories, regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water and highway and the natural flow of commerce, and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally flow through such ports."

5. Stockton has apparently abandoned its contention that respondents' equalization constituted an unjust and unreasonable regulation and practice related to or connected with the receiving, handling, storing or delivery of property within the meaning of section 17. In any event, as the Examiner correctly pointed out, respondents' equalization rules and practices had nothing to do with the receiving, handling, storing or delivering of property. *Beaumont Port Commission v. Seatrain Lines*, 3 F.M.B. 556 (1951).

ciples and policies of section 8 of the 1920 Act, thus no violation of sections 15 and 17 of the Shipping Act resulted therefrom and (2) that the territory which was naturally tributary to Stockton was also naturally tributary to San Francisco, and that under the applicable precedents the absorption of inland freight differentials is unlawful only if it destroys the rights of ports to traffic originating in the areas naturally tributary to them, and (3) that respondents' equalization as practiced against Stockton was lawful under the applicable precedents. Stockton argues that the examiner was wrong on all three counts.

Port equalization is not unlawful in principle. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941). Equalization may be unlawful, however, if it draws from ports traffic which originates in areas naturally tributary to those ports, *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 486-87 (1941); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 55, 56 (1960), and if the port losing the diverted traffic can offer adequate service to shippers diverting to the favored port, *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664, 679 (1955). Equalization may also be unlawful if it is practiced between ports located in different or separate harbors or geographic areas. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943).

With these principles in mind, we can now examine more closely the examiner's findings and conclusions.

The examiner treated Stockton as an integral part of the San Francisco Bay "harbor complex" and thus as being within the same "geographical area" which has access to the open sea through the Golden Gate. Stockton contends that the examiner erred because Stockton is not on the San Francisco Bay and it is 84 miles and 5 waterways removed

from San Francisco Bay. Secondly, the examiner concluded that the areas naturally tributary to Stockton were equally so to San Francisco. Stockton argues that here again the examiner fell into error because inland rates from the relevant area are lower to Stockton than they are to San Francisco. It is in this latter contention that we find the essential ingredient in Stockton's attack on respondents' equalization. In Stockton's view naturally tributary territory means simply "the area from which the inland transportation rates and mileages are less to a particular port than to any other port."

We agree with the examiner's conclusion that the ports of Stockton and San Francisco do not represent separate and distinct geographical areas. They are both "bay area" ports and have been uniformly treated as such for a variety of purposes. Thus, the California Legislature in a comprehensive report on the San Francisco ports issued in 1951 consistently referred to Stockton as a Bay area port. In setting up the Bay Area Protection and Promotion Program, now contained in *Harbors and Navigation Code,* section 1980, et seq., the San Francisco Bay Area is defined by the California Legislature as—

> . . . that region served by commercial shipping and transportation passing through the Golden Gate, including tributary areas of central and northern California . . . .

In seeking to bring itself within the protection of section 8 of the 1920 Act, Stockton relies on its physical separation from San Francisco Bay proper. But other factors must be considered in making determinations under section 8. Thus, the "economies of transportation" and the "natural flow of commerce" are relevant:

> . . . section [8] requires, all other factors being substantially equal, that a given geographical area and its ports receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. (*City of Portland v. Pacific Westbound*, 4 F.M.B. 664.)

The delineation of a "given geographical area" will almost always of necessity involve the inclusion of ports whose location from specified inland points will vary in distance or mileage. Thus, mileage alone is not the determinative factor. In *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 699 (1943) our predecessor permitted a carrier to equalize Texas City with Houston and Galveston, but not with Beaumont, Texas, where the geographical situation was quite similar to the one under consideration in this case—the geographical relation of Texas City, Houston and Galveston is comparable to that of San Francisco, Stockton and other bay area ports, and the position of Los Angeles is comparable to that of Beaumont:

> The geographical relationship of the ports involved, together with the peculiar characteristics of Seatrain's operation were emphasized at the further hearing. Texas City and Galveston are situated on Galveston Bay which is also the approach to Houston. Entrance to the Bay from the Gulf is through Galveston Harbor which is connected by ship channels with Texas City and Houston. In a geographical sense, the three ports may be described as Galveston Bay ports. Rail distances from Texas City to Galveston and Houston are 14.2 and 42.2 miles respectively. Rail rates on long haul export traffic are the same for the three ports which in *Rate Structure Investigation*, Part 3, Cotton, 165 I.C.C. 595, 660, were described as "one terminal district or port." Beaumont is an inland port situated on the Neches River and having access to the Gulf several

miles east of the Galveston Bay ports. It is approximately 126 miles by rail from Texas City. (2 U.S.M.C. at 701.)

The natural direction of the flow of traffic from the San Joaquin Valley, which Stockton seeks to have declared its exclusive preserve, is through the Golden Gate to the Pacific Ocean. For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton.

As we have already noted, equalization, while lawful in principle, may be unlawful in practice if the effect of the equalization is to draw from ports traffic which originates in areas naturally tributary to those ports. *City of Mobile v. Baltimore Insular Lines Inc.*, 2 U.S.M.C. 474 (1941); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960). The examiner concluded that respondents' equalization practices did not violate sections 16 and 17 on this ground because the territory which is naturally tributary to Stockton is also naturally tributary to San Francisco. It should be kept in mind that the discrimination and prejudice which is prohibited by sections 16 and 17 is that which is unjust and unreasonable. *West Indies Fruit Company et al. v. Flota Mercante Grancolombiana S.A.*, 7 F.M.C. 66 (1962).

Stockton claims to have lost $232,000 in potential revenue on equalized cargo on the theory that all the equalized cargo would have moved through Stockton and that 50 additional ships would have called at Stockton to pick up 800 tons each. Stockton concedes that it would have had additional labor costs, but says that they would not have exceeded

$35,000. Actually these lost revenue figures are not valid because, as Stockton argues elsewhere, not all the equalized cargo would have gone to Stockton but for equalization, and the number of additional vessels which would have gone to Stockton is highly speculative.

On the other hand, at an average additional cost of $3,600 to send a vessel to Stockton it would have cost respondents some $180,000 to send 50 ships to Stockton, or about $67,000 more than the $113,030 it cost them to equalize. Thus, there is ample economic and cost justification for the discrimination against Stockton such as it is. But even this would not save respondents' equalization under the applicable precedents were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Stockton.

Stockton's argument for recognition of most of central California, including the great San Joaquin Valley, as its naturally tributary territory is based entirely upon minimum trucking rates to Stockton, which in turn are based upon the "constructive mileage" between points of origin and Stockton.[6] Stockton contends that the examiner misconstrued the applicable precedents in finding that Stockton's tributary territory was also San Francisco's. As Stockton reads the cases "tributary territory" is that area from which the inland transportation rates and mileages are less to a particular port than some other port. But Stockton's theory is only deceptively simple and does not comport with the principles laid down in prior cases. Under this "constructive mileage" theory the naturally tributary territory expands and contracts with every new highway inno-

6. "Constructive mileage" is actual mileage weighed by such factors as the number of traffic lights and bridges, the presence or absence of mountainous terrain, the condition of the highways and other factors affecting truck traffic.

vation because constructive mileage changes with new bridges, traffic lights and the like. Under Stockton's theory the territory is dependent upon which ports are named "terminal ports" by the carriers practicing the equalization. Thus, when the respondent Pacific Westbound Conference, but not the Straits or Indonesian Conferences, named Sacramento as a terminal port, Stockton's own witness, Mr. Phelps, stated that Stockton's tributary territory for the Pacific Westbound Conference was thereupon cut in half because "that is the way the arithmetic comes out."

In the *Beaumont* decision, *supra;* when it permitted Seatrain to absorb the difference between the cost of delivering cargo to Texas City and the cost of delivering to Houston and Galveston, the Board said at page 703:

> Our decision in the previous report condemned practices which permit a carrier to attract to its line traffic which is not naturally tributary to the port it serves, thus depriving other ports of their local tributary traffic. The testimony and argument on further hearing emphasize the question which we think is decisive in this case, whether the traffic in question can be considered as tributary to Seatrain [at Texas City] as well as to the break-bulk lines involved. Upon the facts stated in three above, we conclude that the area comprising the ports of Galveston, Houston and the surrounding territory is centrally served by Seatrain's facilities at Texas City. No reason appears therefore why that carrier may not effectively compete for the traffic through such ports. Beaumont is not within the Galveston Bay Group and the traffic through such port is not naturally tributary to Texas City.

Although Stockton urges that the examiner's reliance on the *Beaumont* decision is misplaced we think it reasonable, well founded and proper. Moreover, the Maritime Administration, Department of Commerce, and the Corps of Engineers, Department of the Army, the governmental agencies

charged with administering section 8, in their joint publication[7] covering the port of San Francisco, describe San Francisco as "one of the most important ports for the vast inland territory of the Central and Pacific Coast Area and the Intermountain States," under the heading "Tributary Territory." In their publication covering Stockton, the "Tributary territory" designated as that of Stockton is wholly within the territory attributed to San Francisco, and largely within the territory attributed to Oakland-Alameda in the publication covering those ports. It is obvious that these studies dictate a rejection of any "constructive mileage" theory for determining "naturally tributary territory."

We conclude, that for the purposes of this proceeding, the territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. To paraphrase the *Beaumont* decision, *supra*, the territory surrounding Stockton and the entire Bay area is centrally, economically and naturally served by the conference facilities at San Francisco.

Stockton further urges that respondents' equalization rule is unlawful, because the actual amounts to be absorbed under it cannot be determined from respondents' tariffs, but requires access to and examination of the overland tariffs. Stockton cites several cases construing the provisions of section 2 of the Intercoastal Shipping Act, 1933.[8] Section 18(b)(1) expressly provides for the inclusion in

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7. "The Ports of San Francisco and Redwood City, Calif." Port Series, No. 30, Rev. 1951.

8. Cases cited by Stockton are *Intercoastal Rates of Nelson Steamship Co.*, 1 U.S.S.B. 326 (1934); *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400 (1935); *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939); *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941); and *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480 (1963).

tariffs filed by the Commission of "rules and regulations" which change or affect the aggregate filed rate:

> Such tariffs . . . shall also state separately such terminal or other charge, privilege, or facility under the control of the carriers which is granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges. . . .

The basic philosophy behind the tariff filing requirements of both the Intercoastal Act and the Shipping Act is that the shipper can assure himself of the actual cost of transportation to not only himself but to his competitor as well, *Matson Navigation Co.—Container Freight Tariffs,* 7 F.M.C 480 (1963). We do not think respondents' tariffs run counter to this proposition. As the examiner stated, "the present rule, in practice, neither adds to nor detracts from the shippers ability to 'see for himself the exact price of transportation.'"

The ocean rate is, of course, specified in the respondents' tariffs. What the respondents' tariffs do not show is the difference between the cost of overland transportation from the shipper's point of origin to Stockton versus San Francisco. For that the shipper (or his competitor) has to go to the tariffs of inland carriers. But he would have to do so whether or not the equalization rule existed. With the equalization rule, his problem is really simplified; he need only ascertain the common carrier rate to Stockton, and he is assured by the ocean carrier's rule that he may ship via San Francisco for the same amount, with the carrier absorbing any excess. If he wants to get into further refinements, such as the comparative cost of shipping by common carrier versus his own truck or contract carrier, his problem is no more complicated than it would be if there were no equalization rule.

Stockton argues that the failure to set forth the actual amounts absorbed makes the equalization rule unlawful under section 18(b)(1) and detrimental to commerce and contrary to the public interest under section 15. But consider the form respondents' tariff would take if the actual amounts absorbed were included. The record does not contain even an estimate as to the number of "points of origin" for which equalization is made nor does it contain the number of commodities covered by equalization. But it is not difficult to imagine that a requirement that each and every possible absorption be published would soon render the tariff impossibly voluminous.

We are of the view that respondents' equalization rules are not unlawful under the "rules and regulations" portion of 18(b)(1).

Stockton contends that the determination of equalization payments under respondents' rules is, as a practical matter, impossible; and that therefore the rules (1) permit undue preference and prejudice between shippers, in violation of section 16 First, (2) constitute improper tariff publication, in violation of section 18(b)(1), and (3) violate section 15 of the Act, in that they are contrary to the public interest, detrimental to United States commerce, and unjustly discriminatory between shippers and exporters.

The Pacific Westbound Conference equalization rule provides that "Equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates." The rules of the Pacific Straits and Pacific/Indonesian Conferences are substantially the same—that "Equalization shall only be paid on the basis of the lowest applicable rates."

In practice, the freight bill showing the amount actually paid by the shipper to an overland carrier to transport the

shipment from point of origin to San Francisco (or other port of loading) is used in determining the amount of equalization to be paid; however, the bill is checked against carriers' tariffs to make sure it is the lowest rate. From this amount is deducted the "constructive" cost of transportation of the same shipment from point of origin to Stockton (or other port equalized "against"), determined from the same tariff. The difference is the amount of the equalization payment. The result is that the shipper pays, for overland transportation, a net amount equal to the cost of carriage at the lowest common carrier rate from point of origin to Stockton. As noted above there are exceptions where the shipper uses a contract carrier or his own truck. If the contract carrier's rate cannot be ascertained and in the case where a shipper uses his own truck the lowest common carrier rate is used.

Respondents submitted to complainant schedules showing details of all shipments in 1962 on which there was equalization against Stockton. These were examined by a tariff expert in Stockton's employ, over a period of about nine months in which he spent an estimated five to six months in preparing exhibits based on the data. According to his research on the PWC figures, out of 1,116 shipments involving a total of $107,272 in equalization payments, there were 314 instances of overpayment for a total of $8,254, and 322 instances of underpayment for a total of $2,810.

A substantial part of the $8,254 in alleged overpayments arose out of a practice, discontinued during 1962, of allowing the principal shipper of raisins to equalize on the basis of the rate for his less-than-truck-load shipments to San Francisco against the rate for truckload shipments to Stockton. This was done on the theory that if the shipper had shipped via Stockton, the LTL shipments would have been consolidated with shipments destined for Europe, to

form truckload shipments at a substantially lower rate. The shipper complained of the cessation of this palpably improper practice and testified on behalf of complainant as the sole malcontent shipper.

The Examiner concluded that,

> The inland rate situation was indeed shown to be complicated. The inland transportation industry manages to operate under it, however, and the conferences appear to have mastered its mysteries so as to operate their equalization rule fairly as a matter of practical procedure. With the single exception mentioned above —which was concerned with a well-defined dispute, with the conference ultimately taking the proper course—no shipper testified to any dissatisfaction with the theory or practice of calculating equalization under respondents' rule. There is no other evidence of any differences or possible preferences in the treatment of shippers similarly situated. Had there been any such pattern it may safely be assumed that complainant's expert, in the course of his meticulous examination, would have found it.

Stockton's exceptions to this conclusion amount to nothing more than a reargument of the contentions urged before the Examiner and we find his conclusion well founded and proper.

Stockton further argues that respondents' equalization practices result in unjust discrimination between shippers, in violation of sections 15 and 16 First of the 1916 Act, because varying equalization payments under the rules result in different charges for the same ocean transportation, because respondents ultimately collect varying amounts for transporting the same commodity between the same ports, depending on the inland transportation charges, which determine the amount of the equalization payment. Varying charges for identical services are *prima facie* dis-

criminatory and thus unreasonable unless justified. *Proportional Commodity Rates on Cigarettes and Tobacco,* 6 F.M.B. 48, 55 (1960).

Discrimination against a shipper is necessarily measured by what the shipper pays, not by what the carrier ultimately collects. Shippers who receive equalization allowances pay the same amount for through transportation, whether they ship via Stockton or San Francisco. No shipper has complained of discrimination, and there is no evidence of any differentiation among shippers similarly situated. Under similar circumstances, no evidence of discrimination against shippers was found in *Beaumont Port Commission v. Seatrain Lines,* 2 U.S.M.C. 693, 703, where, as we have already noted, Houston, Galveston and Texas City may be considered the respective equivalents of Stockton, San Francisco and Oakland-Alameda, and Havana the equivalent of conference destinations in the Far East:

> Complainants' contention that Seatrain's practice unjustly discriminates against Galveston and Houston will not bear analysis. The port-to-port rates to Havana from these ports and Texas City are the same. The shippers served by Seatrain pay the same through transportation charges, whether they ship from Galveston, Houston or Texas City. There is no complaint of, or evidence to show, discrimination against shippers by Seatrain.

Moreover, any *prima facie* discrimination based upon ocean carriage alone—as between, say, a shipper located at San Francisco who receives no equalization allowance and one located at Fresno who receives equalization against Stockton when he ships via San Francisco—is justified by the facts of record. The record is clear that the fewer loading ports in the normal itinerary, the better operating results the carrier will have. To eliminate equalization, there-

by requiring carriers either to call at Stockton or abandon some of the cargo in that area, would be beneficial to the Port of Stockton and perhaps some of the shippers in that area. But the public interest is much larger than the needs or desires in the Stockton area. The equalization under consideration here reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification.

We conclude that no unjust discrimination between shippers, or undue or unreasonable preference or advantage to any particular person, within the meaning of sections 15 and 16 First of the 1916 Act, may be found in respondents' equalization rules or their practices pursuant thereto.

Stockton also argues that the respondents unnecessarily dissipate their revenues through their equalization allowances, since (1) the most economical way to move cargo is to load it aboard a vessel which is at Stockton, and (2) in some cases cargo which is equalized against Stockton would be shipped via San Francisco anyway. Such dissipation is alleged to be contrary to the public interest and detrimental to the commerce of the United States, in violation of section 15 of the 1916 Act.

The record does not support Stockton's contentions. The most economical way to move cargo was shown not always to be to load equalized cargo aboard a vessel at Stockton which was there to load other cargo. PFEL frequently transships cargo by truck (at its own expense) to San Francisco for loading aboard a vessel which has called at Stockton, because it is cheaper to do that than to move the vessel, at a cost of some $300, from a bulk cargo berth to another berth at Stockton. Transshipment costs the carrier a great deal more than equalization, since it not only pays the full cost of truck transportation from Stockton

to San Francisco, but also pays handling and loading charges to both ports.

Even if it is more economical for a carrier whose vessel is already at Stockton to load there rather than equalize, it does not follow that it will be cheaper for a competitor that does not have a ship at Stockton and does not have bulk cargo contracts which make it economical to send a ship there.[9] For the carrier that actually equalizes, there is no dissipation of revenue through equalizing as against sending a ship to Stockton. In this respect, equalization is self-correcting. If there is sufficient cargo available to a carrier to make it more economical to call at Stockton, the carrier will normally do so rather than equalize.

There is no evidence that equalization is not profitable, overall, to any carrier that equalizes, nor is there any evidence that the public interest or commerce of the United States has been adversely affected by any dissipation of carriers' revenues. The evidence indicates, rather, that equalization is financially beneficial to the equalizing carrier.

Moreover, it should be noted that even with equalization, Stockton's growth since 1957 has put it ahead of the ports of San Francisco, Oakland and Alameda combined, in export tonnage. General cargo (via conference and non-conference vessels) to conference destinations increased by over 50% in 1962 over 1961, although total cargo to

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9. Respondent PFEL, the only carrier that was critical of equalization against Stockton, frankly considers its position to be "more advantageous than others insofar as calling at the Port of Stockton . . . we have contracts for bulk cargoes for justification to put us up to the Port of Stockton which other lines do not have." Thus PFEL feels it could get "the lion's share" of any additional tonnage going through Stockton. Still, PFEL now transships cargo from Stockton by truck and also equalizes against Stockton.

conference destinations declined from 1,308,558 tons to 1,108,726 tons. Thus, equalization has not seriously affected Stockton's competitive position. Stockton also argues that there is a violation of section 205 of the Merchant Marine Act, 1936, which provides:

> SEC. 205. Without limiting the power and authority otherwise vested in the [United States Maritime] Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

No functions with respect to this section of the 1936 Act were transferred to the Federal Maritime Commission by Reorganization Plan No. 7 of 1961, which established the Commission. However, complainant suggests that section 205 remains the law of the land, and must be considered by the Commission in exercising its delegated functions. Stockton is a port designed for the accommodation of ocean-going vessels, located on an improvement authorized by the Congress, and is therefore entitled to the protection of section 205, as our predecessor said of the Port of Stockton and other bay area ports in *Encinal Terminals v. Pacific Westbound Conference,* 5 F.M.B. 316, 320 (1957). But section 205 is not violated by respondents' equalization rules as observed in practice; i.e., with the elimination from the rules of the phrase purporting to restrict its operation to cargo "which would normally move" from a given point. This apparent restriction has

no practical relation to the theory or operation of the rule. Perhaps it was originally intended to make it clear that cargo may be equalized even though it might "normally" move from another port, thus anticipating any objection on that ground. The rule should be drafted to exclude what is clearly not intended as a restriction. The rules, as applied, permit equalization in favor of Stockton to exactly the same extent as against it. Respondents comply literally with the statute by serving Stockton at the same rates which they charge at the nearest port regularly served by them, since rates are the same for all bay area terminal ports. If equalization is considered to change the base rates from any such port, respondents are in compliance with the statute because they offer the same equalization to shippers who wish to load at Stockton.

Finally, Stockton argues that equalization "serves as a cloak for malpractice." In support of this proposition PFEL's representative referred to one case of unidentified "malpractice" which he said had resulted in a Commission investigation. The representative further testified that upon two occasions PFEL had been offered a shipment if it would equalize on the basis of a trucker's bill of lading showing a point of origin more remote from the loading port than the actual point of origin. As respondents suggest, it would appear that if a shipper and carrier conspire to engage in crime, they can find simpler and safer methods than getting a third party to produce a false bill of lading. Giving full credence to PFEL's testimony, however, it cannot be concluded that respondents' equalization rules and practices offer such a peculiar temptation or facility for malpractice as to make it desirable to eradicate equalization completely. There was no evidence in the record of any malpractice affecting Stockton.

Stockton also points to a practice of the PWC respondents with respect to citrus fruit, allegedly affecting Stockton. For a number of years it has been the practice of respondent PWC and its members to allow an "equalization" payment of 15 cents per carton on citrus fruit shipped from San Francisco if it originated in "Southern California." Southern California is defined as the territory south of a line drawn east from Santa Barbara, south of the area in which constructive mileage, and carrier rates, are lower to Stockton than to San Francisco. This 15-cent allowance is not based upon any excess overland transportation cost as such, but rather on the fact that citrus shippers located south of the Santa Barbara line quote exporters a price delivered to a dock in "Northern California"—particularly San Francisco—which is 15 cents per carton higher than their price delivered to dock in Los Angeles Harbor. For reasons not apparent from the record the ocean carrier allows the exporter (the shipper from the standpoint of ocean carriage) an amount equal to this difference in the price of fruit delivered f.a.s. San Francisco as against f.a.s. Los Angeles. There is in practice no other equaliztion with respect to citrus fruits. The conference is not asked to equalize against Stockton or otherwise on fruit originating north of the Santa Barbara line, and in practice citrus fruit is never shipped from Stockton.

Thus, there is an allowance against ocean freight on citrus fruit shipped from "Northern Calfornia" ports as against shipments from "Southern California" ports at the rate of 15 cents per carton, based upon an arbitrary price differential of 15 cents, with respect to fruit originating south of the Santa Barbara line.

The PWC chairman necessarily conceded that this "equalization" is not found in the PWC equalization rule,

but PWC argues that it accords with the principle of equalization, which it contends is the absorption by the carrier of the difference between the shipper's cost at the nearest terminal port and the loading port. But this is too loose and inaccurate a definition. As the rule itself states, equalization is the absorption by the carrier of the shipper's excess cost of *delivery* to the loading port. That is quite different from absorbing a differential in the shipper's ("exporter's") purchase price, resulting from a sort of basing-point system used by the grower-seller. The exporter, who is the shipper as far as the ocean carrier is concerned and the one who bills the conference for equalization, in fact has no cost of delivery to ship's tackle; he buys at a flat price f.a.s.

The conference has reported to the Commission data with respect to citrus fruit equalization, purportedly as equalization under its tariff rule, showing point of origin as "Southern California" and rate of equalization at 15 cents per carton. This does not validate the practice, but neither does it invalidate respondents' published rule, nor contaminate the rule so as to require its disapproval.

However, this so-called equalization on citrus fruit is not in accordance with or pursuant to respondents' filed tariff. Thus, respondents PWC and its members have failed to comply with paragraphs (1) and (3) of section 18(b) of the 1916 Act, in that they have not filed a rule or regulation which affects a part or the aggregate of their filed rates, and have charged a different compensation for transportation from their rates and charges on file. Moreover, in our view, the absorption of an arbitrary amount based upon a differential in delivered "price" of a commodity is unjustly discriminatory between ports within the meaning of section 15, since the amount absorbed has no

transportation basis or justification. It is further found, however, that such practices have not diverted cargo from, and do not affect, the Port of Stockton.

While the examiner concluded that the rules and practices with respect to equalization between terminal ports within the San Francisco Bay area were not unlawful, he found that:

> . . . to the extent that they permit general equalization upon cargo loaded at the ports of Los Angeles and Long Beach, California, based upon the excess cost of inland transportation from point of origin to such ports over such cost to San Francisco, Stockton or any other port within the San Francisco Bay harbor complex, are unjustly discriminatory and unfair between ports, within the meaning of section 15 of the 1916 Act; and to such extent the said rules, and practices pursuant thereto, are disapproved.

PWC excepts to this holding on the grounds that the examiner made no findings to support this conclusion contrary to the requirements of section 8(a) of the Administrative Procedure Act (5 U.S.C. 1007) and that there is no evidence in the record, not to say substantial evidence, on which this finding could be premised.

We hold that the examiner decided this issue correctly and on the basis of adequate proof. The initial decision correctly set forth the legal test to be used: If the absorption of inland rate differentials destroys the right of ports to traffic originating in the areas naturally tributary to them, the absorption is unduly prejudicial to such ports where service from the port equalized against is adequate. The examiner noted that the number of shipments equalized against Stockton in favor of Southern California ports in 1962 was small, but of substantial tonnage. The examiner found that the Golden Gate is 423 statute miles north of Los

Angeles and that the territory tributary to the Southern California area is not tributary to San Francisco Bay area ports. He further found that service from Bay area ports was adequate.

The record shows details of shipments equalized against Stockton where the cargo actually moved from Los Angeles and Long Beach. The record also shows details of inland transportation costs between interior points and terminal ports, including Los Angeles and Long Beach, and the adequacy of service at Stockton and other Bay area ports.

Therefore, we agree with the examiner that equalization of cargo via Southern California ports destroys the right of Bay area ports to traffic originating in the area naturally tributary to them. It is obvious that this type of equalization diverts traffic away from the natural direction of the flow of traffic. This situation is, as found by the examiner, contrary to our decisions in *Proportional Commodity Rates on Cigarettes and Tobacco,* 6 F.M.B. 48 (1960), and *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 and 5 F.M.B. 118 (1956).

The examiner made those findings, supported by evidence, which are prerequisite to the application of the legal test of equalization. We, therefore, reject this exception of PWC.

PWC contends further that the equalization against Bay area ports where cargo moved through a Southern California port is not pertinent to the issues in this proceeding. We reject this argument. We will not ignore unjust discrimination even though it was not raised with respect to Bay area ports other than Stockton in the complaint. We disposed of a similar argument in *City of Port-*

land v. Pacific Westbound Conference, 5 F.M.B. 118, 129 (1956), where we stated:

> PFEL's view appears to require a conclusion that that we are rigidly limited in our findings and conclusions by the precise language of a complaint or order of remand, regardless of the facts which may be developed *and argued* by the parties to the proceeding.
>
> We do not share this view of our duties under the Shipping Act, 1916 ("the Act"). In our view, we would be remiss in our duties if, assuming actual direct service by Java Pacific, we did not, acting on this record, prevent continued unlimited equalization on dynamite by PFEL. As stated in *Chesapeake & O. Ry. Co. v. United States,* 11 F. Supp. 588, 592 (1935), in discussing an Interstate Commerce Act provision similar to our section 22:
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> > * * * after a complaint is filed before the Commission, it becomes the duty of the Commission, to investigate the complaint and take proper action upon its own motion * * * its power is not restricted by the issues raised on the complaint, provided * * * that the (respondent) * * * had full opportunity to make (its) defense.
> >
> > It is the duty of the Commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law.
>
> This Board, like other administrative agencies, has an affirmative duty to investigate as well as to decide, in consonance with its position as trustee of the public interest in matters within its jurisdiction.

The conference further argues that the examiner's finding in this respect should be qualified to take into consideration which of the San Francisco Bay area ports have adequate service. In fact, PWC contends that equalization should be proper where service at San Francisco

Bay area ports is unsatisfactory in any respect. We reject this test of equalization in favor of that previously expounded—that equalization is unlawul if it destroys the right of ports to traffic originating in the area naturally tributary to them where service from the San Francisco Bay area is adequate. And the likelihood of inadequacy at San Francisco Bay area ports is remote indeed. We, therefore, will not qualify the examiner's holding.

We reaffirm that respondents' equalization rules to the extent that they permit equalization upon cargo loaded at the ports of Los Angeles and Long Beach, California, based upon the excess costs of inland transportation from point of origin to such ports over the cost of inland transportation to Bay area ports, are unjustly discriminatory and unfair between ports within the meaning of section 15. We will disapprove the equalization rules to this extent.

An appropriate order will be entered.

Commissioner Hearn Dissenting:

I agree with the majority opinion in that the implementation of respondents' equalization rules in favor of Los Angeles and Long Beach are unjustly discriminatory and unfair. I find the discrimination so far as it relates to cargo which is naturally tributary to Stockton to be a discrimination against Stockton only, which for reasons given below can in no way be considered a San Francisco Bay area port.

I disagree, however, with the results reached by the majority and am convinced that the subject equalization rules against Stockton[1] are violative of Section 16 First of the

1. The statement at page 23 of the majority opinion that "The rules, as applied, permit equalization in favor of Stockton to exactly the same extent as against it" betrays a certain naivete in coming to grips with the issue. While the word "permit" lends authenticity to the statement, in the nature of things, the equalization must always work against Stockton vis-a-vis San Francisco Bay area ports.

Shipping Act, contrary to the public interest standard of Section 15, and in contravention of the principles and policies of Section 8 of the Merchant Marine Act, 1920, and Section 205 of the Merchant Marine Act, 1936.

I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. Further, the establishment of Stockton as a "terminal port" by all of the Conferences, in 1957 by the Pacific Westbound Conference, becomes insofar as the port of Stockton is concerned, a meaningless gesture.[2] The majority has recognized that the port of Stockton "has had phenomenal growth" since the Port of Stockton attained "terminal port" status. I fear that the majority decision here will seriously impair that growth. Millions of dollars, both public and private, have been invested in the port.[3]

At least one conference carrier has provided substantial scheduled service at the port of Stockton. The majority's action today will bless the efforts of those carriers who have no intention of giving direct service to the port, and those carriers who have traditionally bypassed the port, with the opportunity to drain its general cargo. As the Commission stated recently *"In The Matter of Agreement Nos. 6200-7 etc.,* Docket 1166 (served June 24, 1965),

> "It seems elemental that the carriers best able to establish fair and equitable rates for a given trade

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2. This status was accorded as a result of *Encinal Terminals v. Pacific Westbound Conference,* 5 F.M.B. 316 (1957).

3. At the beginning of 1964 the capital outlay in the Port of Stockton was 23 million dollars. This investment included $9,800,000 by the port district; $3,200,000 by the city of Stockton; $3,800,000 by the Federal Government; $500,000 by the State of California; and $5,700,000 by private investors.

> are those carriers which are actually serving the trade . . . we believe the vesting of rate-making decisions in carriers who do not serve the area in whose rates they have a voice to be far more dangerous to the commerce of the United States than the existence of rate competition between two competing areas."

The majority notes at page 8, reasons why shippers favor equalization: regularity of service and shorter in-transit time. It goes without saying, I think, that shippers universally favor superior service and shorter transit time where these benefits can be secured without additional cost to them.[4]

In my view, the majority's reference that:

> "For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton."

belies an unconscious adherence to the "fundamentally entitled" theory which has ceased to have any value since *Pacific Far East Lines, Inc. v. Federal Maritime Board*, 275 F 2d 184 (1960).

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4. A curious statement appears on page 8:
"If there were no equalization many perisable commodities would still move through San Francisco rather than Stockton." The majority, of course, do not state why any of the overland costs to San Francisco on commodities shipped through San Francisco *for the convenience of the cargo* should be absorbed by the carriers. This particular instance reveals the chink in the majority's decision: equalization is permitted against Stockton, as an economy to the carrier where the cargo would be shipped ex-Stockton, and having permitted this, a rebate measured by the difference by the overland cost to Stockton and overland cost to San Francisco on cargoes ordinarily and traditionally shipped ex-San Francisco follows because the cargoes intended for the different terminal ports can not be separated.

My dissent, however, need not be placed upon such broad generalities.

The central point here is conference tariff rules which "permit" carriers to equalize against Stockton. The majority has correctly assessed the thrust of the "permissiveness" of these rules: ". . . carriers find that competition compels them to equalize". Thus a conference carrier is not free to serve or not serve Stockton as its sound managerial judgment dictates, consequently the effect of the equalization rules is to restrict competition between the ports.

In reaching its ultimate conclusion, the majority found that (1) the port of Stockton is a port in the San Francisco Bay area, and (2) cargoes naturally tributary to Stockton are also naturally tributary to San Francisco. While I think neither of these findings is correct, I believe they skirt and confuse the central issue, which is: Do these tariff rules result in an unjust discrimination to the port of Stockton? The findings, moreover, are not supported by the facts, and have no valid basis in law.

First, the port of Stockton is not a San Francisco Bay port within the meaning of any statute administered by this Commission, and the cited "comprehensive report" of the California Legislature in 1951 referring to Stockton as a Bay Area port certainly is not controlling here, if indeed it has any relevance at all. The incontrovertible facts are that Stockton is some 107 constructive miles and several distinct waterways removed from San Francisco Bay. It is unthinkable that the Port of Stockton should be considered as juxtaposed to San Francisco, Oakland, Alameda and Richmond. The finding that Stockton should be treated as a Francisco Bay port must hang as an unwarranted fiction upon which no legal conclusion can be based.

Secondly, to say, as does the majority, that the "natural direction of the flow of traffic from the San Joaquin Val-

ley . . . is through the Golden Gate to the Pacific Ocean" begs the question. The point at issue is whether the "natural direction of the flow of traffic from the San Joaquin Valley . . . through the Golden Gate . . ." is through San Francisco or through Stockton. I hold to the belief that this natural flow is through Stockton, and succinctly stated, but for the equalization, an admittedly artificial device, San Joaquin exports would normally flow through the Golden Gate via Stockton, except where, *for the convenience of the cargo,* shippers are not only willing to but should pay their fair share of costs of the premium service offered at San Francisco.

The majority places some reliance upon 1951 Port Series[5] reports to show that the San Joaquin cargoes are as "naturally" tributary to San Francisco as they are "naturally" tributary to Stockton. A perusal of the cited works fails to uncover the adverb "naturally". Hence the "obviousness" that "these studies dictate a rejection of any 'constructive mileage' theory for determining 'naturally tributary territory' " is indeed wanting.

The only valid test, in this case, for determining whether or not the effectuation of the equalization rule, and consequently for determining whether respondents are giving "any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic" or subjecting "any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage" in violation of Section 16 First, is whether the traffic would move via San Francisco *but for* the equalization. Here, certainly, most of it *would not* and to the extent

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5. "The Ports of San Francisco and Redwood City, California." Port Series No. 30, Rev. 1951, and a similar study covering Stockton, also in 1951, prepared by the Corps of Engineers and the Maritime Administration.

that the artificial device draws traffic from Stockton it is unlawful.[6]

In this vein, I am convinced that the precedents support my view. There can be no doubt here that the equalized cargoes originate in areas "naturally and geographically tributary [to Stockton] because of inland transportation rates favorable to [Stockton] as well as through closer proximity". *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955). Similarly, what was said in *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941), is appropriate here:

> "To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome would wholly ignore the right of a port to traffic which it may be entitled by reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports".[7]

Again, in the *Portland* case, *supra*, our predecessors interpreted section 8 of the Merchant Marine Act, 1920, as requiring:

> "... that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area".

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6. An unforeseen consequence, perhaps, of the majority's decision, as I read it, would permit respondents to later equalize against Oakland, Alameda, Richmond and Redwood City in favor of San Francisco: They are all within the same "geographical area"; their traffic must move through the Golden Gate; carrier economies would be established; and, since the user shippers do no pay for it, directly, they would be satisfied.

7. Cited favorably as recently as 1960 in *Proportional Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960).

Moreover, the second Beaumont case at 2 U.S.M.C. 699 (1943), so heavily relied upon by the majority, is inappropriate here. As complainant aptly pointed out, the second *Beaumont* case turned, in large measure, on the peculiar characteristics of the equalizing carrier's operation. There the carrier, Seatrain, required, in addition to railroad tracks on the pier, "a supporting yard for sorting and holding cars, and car lifting facilities for transferring cars from the pier tracks to its vessels" which were not available at the ports equalized against. Such is not the case here. Stockton, the record shows, can accommodate all of the vessels of repondent conferences.

The striking down of the instant equalization rules, I am convinced, would be in furtherance of the will of Congress expressed by the Shipping Acts, section 205 of the Merchant Marine Act, 1936, and its several enactments respecting the port of Stockton itself. The absence of the equalization rules, moreover, would leave carriers free to serve or not serve Stockton as they desire, unencumbered by artificial devices designed to frustrate the growth of the port and calculated to check-mate the establishment of any carrier giving Stockton regular, scheduled service.

Statement by Commissioner Patterson:

Commissioner Patterson concurs in the result, but will issue later a supplemental report including a statement of his decision showing his findings and conclusions and the reasons or basis therefor.

/s/ THOMAS LISI
Thomas Lisi
Secretary

SERVED
September 24, 1965
FEDERAL MARITIME COMMISSION

Federal Maritime Commission

No. 1086

STOCKTON PORT DISTRICT

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

ORDER

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on September 24, 1965, has made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia:*

1. That the equalization rules of the respondents (Pacific Westbound Conference, Pacific Straits Conference and Pacific/Indonesian Conference, and the members of these conferences), to the extent that they provide for or permit equalization of inland transportation from shipper's point of origin to any terminal port located on the harbor of San Francisco Bay and its connecting waters (the existing ports so designated and described being the ports of San Francisco, Oakland, Alameda, Richmond, Stockton, Sacramento), on cargo loaded at Los Angeles or Long Beach, California, are violative of section 15 of the Shipping Act, 1916; and

2. That the equalization rules of the above conferences and their members providing for or permitting

equalization of inland transportation from shipper's point of origin to any of the said terminal ports located in the harbor of San Francisco Bay and its connecting waters on cargo loaded at any other of said terminal ports are unclear in their references to cargo "which would normally move"; and

3. That Pacific Westbound Conference and its member lines have engaged in practices with respect to payment of purported "equalization" in connection with citrus fruit not provided for in their tariff in violation of section 18(b) of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED,

1. That the respondents cease and desist from applying their equalization rules to cargo loaded at Los Angeles or Long Beach, and that modifications of their equalization rules to exclude their application to cargo loaded at such ports be filed within .... days of service of this order;

2. That the respondents, in so modifying their rules, omit the characterization of cargo as that "which would normally move" from certain ports; and

3. That respondent, Pacific Westbound Conference and its member lines cease and desist from their present practices with respect to payment of purported "equalization" in connection with citrus fruit in violation of their tariff.

By the Commission.

(SEAL)

/s/ THOMAS LISI
Thomas Lisi
Secretary

APPENDIX A

Rule No. 2 of Pacific Westbound Conference

(The "Equalization rule", so far as it relates particularly to the Port of Stockton, is underlined.)

Subject to Rules 5, 7 & 9, rates are based on direct loading at Conference terminal loading ports or docks. However, individual member lines may, in lieu of a direct call, absorb the cost of transhipment between terminal ports; or between terminal ports and non-terminal ports; also between non-terminal ports. Reference to non-terminal port absorption applies only if the non-terminal ports have the required minimum tonnage as specified in Rule No. 9, or elsewhere in this tariff. Carriers may equalize between terminal ports only from point of origin, as provided and subject to the limitations set forth herein.[1] Equalization is the absorption by the carrier of the difference between shipper's cost of delivery to ship's tackle at Terminal Dock at nearest conference terminal port and the cost of delivery to ship's tackle at terminal dock and port of equalizing line. Conference terminal ports and docks are those named in Rule No. 5. Conditions and limitations as to equalization follow:

(a) Equalization shall not exceed an absorption in excess of 35 percent of the ocean freight, including handling charges and wharfage.

(b) A carrier may not equalize between terminal ports and non-terminal ports, or between non-terminal ports or between docks within a port.

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1. In the Pacific Straits Conference rule and the Pacific/Indonesian Conference rule, the following appears in lieu of the foregoing four sentences:

> Rates are based on direct loading at loading port or docks, but the individual member line Carriers may meet the competition of other member lines loading direct at terminal ports or docks, either by transhipment or by equalization from point of origin.

Otherwise the rules of the three conferences are substantially the same, insofar as they relate to the Port of Stockton.

(c) When the inland cost of transportation from point of origin is lower to terminal ports in Oregon, Washington, or British Columbia than via California terminal ports, equalization may be applied via California terminal ports only on shipments of deciduous fruits and dairy products (See Note below covering Explosives) and such equalization shall be permitted only so long as there is not adequate service from the terminal port in Oregon, Washington, or British Columbia, to which the cargo is tributary, to meet the needs of shippers of these commodities.

NOTE:

Equalization on explosives is not permitted except that in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing from a terminal through which explosives would normally move at a date which reasonably will meet the needs of such shipper or his consignee, equalization shall be permitted on such shipment, *Provided,* that the shipper certifies to the Conference the need for space on such date and allows 48 hours after receipt of such certification for the Conference to indicate the conference carriers who can provide space on a direct sailing which reasonably will meet the shipper's needs.

(d) Equalization is permitted on shipments of fresh fruits, which would normally be shipped via California terminal ports when shipped via terminal ports in Oregon, Washington, or British Columbia, when there is not adequate service from the California port, to which the cargo is tributary, to meet the needs of shippers of these commodities.

(e) Cargo which would normally move from one terminal port in Oregon, Washington, or British Columbia, may be shipped under equalization through another terminal port in Oregon, Washington, or British Columbia, and cargo which would normally move from one California terminal port, may be shipped under equalization via another California terminal port.

(f) Equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates.

(g) In support of each claim for equalization the shipper must furnish the carrier a copy of transportation bill covering movement from point of origin.

(h) Prior to payment of equalization bills, Carriers must submit to the Conference on prescribed form a certified statement for confirmation and approval of applicable interior rates and/or the basis for equalization.

SERVED
September 28, 1965
FEDERAL MARITIME COMMISSION

Federal Maritime Commission

NO. 1086

STOCKTON PORT DISTRICT

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

AMENDED ORDER

This amended order is to be attached to the report in this proceeding in lieu of the order served September 24, 1965, in this proceeding.

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on September 24, 1965, has made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia:*

1. That the equalization rules of the respondents (Pacific Westbound Conference, Pacific Straits Conference and Pacific/Indonesian Conference, and the members of these conferences), to the extent that they provide for or permit equalization of inland transportation from shipper's point of origin to any terminal port located on the harbor of San Francisco Bay and its connecting waters (the existing ports so designated and described being the ports of San Francisco, Oakland, Alameda, Richmond, Stockton, Sacramento), on cargo loaded at Los Angeles or Long Beach, California, are violative of section 15 of the Shipping Act, 1916; and

2. That the equalization rules of the above conferences and their members providing for or permitting equalization of inland transportation from shipper's point of origin to any of the said terminal ports located in the harbor of San Francisco Bay and its connecting waters on cargo loaded at any other of said terminal ports are unclear in their references to cargo "which would normally move"; and

3. That Pacific Westbound Conference and its member lines have engaged in practices with respect to payment of purported "equalization" in connection with citrus fruit not provided for in their tariff in violation of section 18(b) of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED,

1. That the respondents cease and desist from applying their equalization rules to cargo loaded at Los Angeles or Long Beach, and that modifications of their equalization rules to exclude their application to cargo loaded at such ports be filed within 30 days of service of this order;

2. That the respondents, in so modifying their rules, omit the characterization of cargo as that "which would normally move" from certain ports; and

3. That respondent, Pacific Westbound Conference and its member lines cease and desist from their present practices with respect to payment of purported "equalization" in connection with citrus fruit in violation of their tariff.

By the Commission.

(SEAL)

/s/ THOMAS LISI
Thomas Lisi
Secretary

Report of Commissioner John S. Patterson:

The reasons for a separate report of my decision are that the majority, in my opinion:

(1) has gone beyond the Commission's functions assigned under section 103 of Reorganization Plan No. 7 of 1961 by interpreting section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936, and

(2) did not make the record show the ruling on each exception presented.

Functions relative to the authorizations in sections 8 and 205 were not transferred to us by the President with the approval of Congress pursuant to the Reorganization Act of 1949 but were vested in the Secretary of Commerce. The Secretary of Commerce is the federal official responsible for deciding what these sections mean under various circumstances, and we should not, in my opinion, prejudice his decisions nor create the possibility of unwarranted conflicting decisions among government agencies.

Section 8(b) of the Administrative Procedure Act directs agencies to make their records show the ruling upon each exception presented prior to decisions upon agency review. The subsequent decisions must also include a statement of the reasons or basis for all conclusions upon all the material issues of fact, law, or discretion presented on the record. This report of my decision is believed to comply with these mandates. My colleagues' report states: "if in stating those reasons we fail to treat any 'specific exception', it has nevertheless been considered and found not justified." It seems to me an adjudicator should not relieve himself of a responsibility to pass on complainant's well-thought-out ex-

ceptions with such general statements. The statements are only unsupported assertions without basis or reason.

The facts stated in the majority report are accepted for the purposes of this report.

Complainant Stockton made eight requested findings and conclusions with respect to sections 15, 16, 17, and 18(b) of the Act. The findings are summarized in the next paragraph as items 1 through 8, and the conclusions of Stockton are stated with respect to each section as noted.

Section 15. The equalization rules require disapproval as agreements because:

1. The amount of the payment cannot be determined by examination of the tariff in detriment to the commerce and contrary to the public interest.

2. The determination of the correct payment is impossible, also involving unjust discrimination between shippers and exporters.

3. Use of the Port of Stockton for freight "which would naturally pass through that port" is discouraged and decreased in detriment to the commerce and in conflict with public interest.

4. The rules result in discrimination and prejudice to the Port of Stockton and preference to other California ports.

5. Different shippers are treated differently in making equalization payments, causing detriment to the commerce and contrariety with public interest.

6. Carriers' revenues are unnecessarily dissipated in detriment to the commerce and contrary to the public interest.

7. Carriers serving Stockton are deprived of cargo against the public interest and in detriment to the commerce.

8. Improper equalization practices are concealed, contrary to the public interest and in detriment to the commerce.

Section 16. The equalization rules are unlawful because the same acts enumerated with respect to section 15 in items 2, 5, and 8 above also permit undue preference and prejudice or unjust "discrimination" (section 16 does not use the word) between shippers; and in item 4 result in undue prejudice to Stockton and undue preference to other California ports in violation of section 16, second paragraph, subparagraph "First".

Section 17. The equalization rules are prohibited because the same actions enumerated with respect to section 15 in items 1, 2, 3, 5, 6, 7, and 8 above constitute unjust and unreasonable regulations connected with the receiving, handling, and storing or delivering of property.

Section 18. The equalization rules violate subsection (b)(1) because the same actions with respect to section 15 in item 1 fail to meet the tariff filing requirements, and in item 2 above constitute an improper tariff publication.

For the reason that the Commission has no authority to administer sections 8 and 205, these laws are not discussed.

The Examiner made a decision on each request, found none of the claims proven, and rejected all of the requested findings and conclusions. Exceptions followed.

The exceptions of A. Stockton Port District and B. Pacific Westbound to which we must address ourselves are as follows:

A. Stockton Port District. Complainant excepts:

1. To all of the Examiner's ultimate findings and conclusions contained in the second paragraph on page 31 of the Initial Decision. The Examiner's ultimate conclusions and findings require subdivision for the purpose of rational

discussion about the distinct provisions of law which he finds not to be violated, so the exception becomes one to the conclusion that the equalization rules and practices pursuant thereto:

a. are not in violation of section 15,
b. are not in violation of section 16, second paragraph, subparagraph First,
c. are not in violation of section 17, and
d. are not in violation of section 18(b).

For the reasons noted above, references to section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936, also referred to by the Examiner, are disregarded as not within our functions.

2. To statements regarding the geographical location of the ports of Stockton and San Francisco.

3. To statements regarding the geographical relationship of Texas City, Houston, and Galveston, Texas, in comparison with San Francisco, Stockton, and other Bay ports, and to the position of Beaumont, Texas, in relation to that of Los Angeles, California.

4. To a statement regarding the territory naturally tributary to Stockton.

5. To a statement that under existing decisions the conclusions regarding naturally tributary territory are determinative of the question as to whether equalization as between Stockton and other San Francisco Bay ports should be disapproved.

6. To the conclusion that the filed equalization rules comply with section 18(b)(1) without filing any inland carrier rates.

7. To the conclusion that the record does not support a finding and conclusion that as a practical matter the determination of payments is impossible.

8. To the statement that the rules as applied do not discourage or decrease the aggregate use of Stockton and other Bay area ports or divert traffic from its natural direction of flow.

9. To the statement that Stockton does not provide adequate service for general cargo shipments to which equalization is applicable.

10. To the statement that the rules and practices are not found to be unjustly discriminatory or unfair between ports.

11. To the statement that there is no unjust discrimination between shippers or undue or unreasonable preference or advantage to any particular person under sections 15 and 16 (First) of the Act.

12. To the statement that there is no evidence equalization is not profitable to any equalizing carrier, nor any evidence that the public interest or commerce of the United States has been adversely affected by any dissipation of carriers' revenues.

13. To the statement it can not be concluded that the rules are a facility for malpractice.

14. To the findings and conclusions with respect to citrus fruit insofar as they approve equalization practices with respect to such commodity if a rule is put in the tariff.

An exception as to the violation of section 205 has been disregarded.

B. Pacific Westbound Conference. Respondent excepts to the conclusion that the rules, to the extent that they permit general equalization upon cargo loaded at the ports of Los Angeles and Long Beach based upon the excess cost of inland transportation from point of origin to such ports over such cost to San Francisco, Stockton, "or any other port within the San Francisco Bay harbor complex", are unjustly discriminatory and unfair between ports under

section 15 and to such extent the rules and practices are disapproved.

The Examiner's ultimate findings and conclusions "contained in paragraph 2 on page 31 of the Initial Decision" are that no provision of the Act has been violated by respondents as a result of the facts summarized in the eight requested findings and conclusions in Complainant's opening brief. The generalized nature of Stockton's first exception requires going back over complainant's eight requested findings, particularly in response to Stockton's further request that "our Opening Brief and our Reply be considered in connection with our argument in support of our exceptions."

My rulings would be as follows:

The rules and practices are authorized by agreements filed pursuant to section 15. These agreements have heretofore been approved as a result of the approval of Agreements Nos. 57, 5680, and 6060. The authorized rules and practices are those in Rule No. 2 in Tariff No. 1-X of Pacific Westbound; Rule No. 1(b) in Tariff No. 6 of Pacific Straits; and Rule No. 1 in Tariff No. 7 of Pacific Indonesia. There is no issue that the agreements relate to the subjects listed in the first paragraph of section 15. We have held that an equalization rule is one of such subjects and must be filed unless the practice set forth in the rule is authorized by the basic Conference Agreements. *Pacific Coast Port Equalization Rule,* 7 FMC 623 (1963) (see pages 630, 631). Our order was affirmed and found valid in *American Export & Isbrandtsen Lines et al vs. Federal Maritime Commission et al,* 336 F. 2d, 650 (C.A. 9th 1964). The tariff rules are an implementation of the filed agreements Nos. 57, 5680, and 6060 provisions forbidding payment in respect of freight and absorption at loading ports of rail freights or other charges except as

"agreed to by two-thirds of the parties" and thereafter shown in tariffs. Two-thirds of the members have bound all the members to perform the equalization absorption rules.

The issues are whether (i) past approval should be withdrawn and disapproval substituted as authorized by Section 15 because of the eight reasons presented, (ii) misdemeanors should be found for violation of section 16, or (iii) unlawful acts halted for violation of section 17, or (iv) penalties imposed for violation of section 18(b).

A. Stockton's exceptions:

1. The ultimate conclusions and fiindings.

(a) Exceptions related to approval of agreements under section 15.

(1) The amount to be absorbed by a carrier through payments equalizing inland shipping costs to Stockton and San Francisco is as determinable as any general rule can make it in view of the various situations to be covered. The amount is measured "on the basis of the lowest applicable" rates, must be substantiated by "a copy of transportation bill covering movement from point of origin", and by a statement of "applicable interior rates and/or the basis of equalization". These requirements are preceded by a definition of what equalization is, such as the definition in Rule 2 appended to the Examiner's Decision. In other respects, pages 7 and 8 of the Examiner's Decision explain adequately how the absorption is a separate transaction after the established ocean freight is paid, and is computed on the basis of tariff-established inland transportation costs. This agency's precedents cited in opposition all concerned cases where the ocean freight rate was subject to adjustment depending on inland costs.

Here there is a separate payment in response to shipper application after objectively establishing inland costs and a public record is kept of all payments. The rule and computation of all amounts are known to everyone. No detriment to commerce nor contrariety with public interest has been proven.

(2) For the reasons given above showing the amount is ascertainable and known, the payments pursuant to the rule are equally easy to establish "on the basis of the lowest applicable common carrier or contract carrier rates" (or "lowest applicable rates" under the Pacific/Indonesia rule) and may not exceed "35 percent of the ocean freight". An established trade practice was shown involving inspection of the shipper's freight bill showing the amount actually paid to the inland carrier. From such amount the calculated cost of shipment to Stockton is subtracted and the difference is paid. Variations are reflected in appropriate revisions, as described by the Examiner. The determination of the "lowest" amount was shown in some cases to be difficult, or complicated, but not impossible. Complainant illustrated these circumstances, but never showed exactly how discrimination between shippers and exporters resulted from the difficulties or complexities, and no discrimination is discerned from inspecting the record. Detriment to commerce or contrariety with public interest are not proven by the fact of difficulty or complexity alone.

(3) The freight that would "naturally" pass through Stockton mostly would be freight that exporters could send to Stockton cheaper than to any other port since ocean freight rates are the same as from San Francisco; consequently, "naturally" is taken to be a euphemism for more cheaply or at less cost. Use of Stockton is unquestionably discouraged or decreased if any economic

advantages in using Stockton are cancelled by paying shippers their added expenses of shipping somewhere else. If the issue were the effect of equalization payments on Stockton alone, the case would end right here, but the effect on shippers and carriers must be considered too. The record showed that the effect of the expenses absorbed by the carriers and payments to shippers pursuant to the rule were for their mutual economic advantage. Shippers benefit from access to frequent, regular, and reliable service at San Francisco. Many are put on competitively more equal terms with shippers of similar products who are closer to San Francisco. Necessary services such as government inspections required for export are available at San Francisco but not at Stockton. Inspections by the Department of Agriculture related to the Public Law 480 program involving primarily bulk cargoes are undertaken, however. For 1961, for example, 200,357 tons of commercial bulk cargo were loaded to or transshiped for conference ships as compared with 51,045 tons of commercial general cargo. Carriers benefit by not having to make the extra 75-nautical-mile journey to Stockton for amounts of cargo insufficient to support regular berth service. The trip costs from $3,200 to $5,000 a round trip. The journey is to some extent hazardous, involving delays for bridge lifting at several points, fogs, turns in the river impeding radar perception, and there have been through September 1961 a total of 110 groundings since the opening of the channel, of which 44 have occurred since December 1947. Stevedoring is more efficient at San Francisco. Stockton is principally a bulk-cargo port, and ships loading parcel cargoes in some cases must move from a bulk loading berth to a general cargo loading berth at extra expense. (Note: The illustration accom-

panying my dissent in Docket No. 1084 makes clear how such ship movement is made necessary.) The Examiner correctly analyzed this evidence as establishing, on balance between Stockton's interest and those of carriers and shippers, no detriments to commerce or conflict with public interest.

(4) Undue, unjust, or unreasonable discrimination, prejudice, and preference involve choices creating inequality of treatment of similarly situated persons for no reason. There are legitimate economic reasons for the carriers' rule based on the different situations at the two ports. The carriers' choice of making equalization payments to avoid a trip to Stockton and the shippers' choices in sending merchandise to San Francisco and having part of the inland transportation costs paid by the carriers involve legitimate business advantage to each. The advantages and disadvantages are described in (3) above. The rights of Stockton to be used as a port do not transcend these mutual advantages. Invalidation of the rule to advantage Stockton would leave the carriers three other choices: (i) to go to Stockton and load available cargo regardless of expense, (ii) transship from Stockton by land or intermediate water transportation and pay the entire cost including terminal and handling costs, or (iii) give up the cargo and not serve Stockton. The first two would not disadvantage the shipper but would cause the carrier expenses which would have to be recovered in higher rates. The third choice would harm shippers who could transport overland more cheaply to Stockton than to San Francisco. The situations of the parties are in no respects comparable. As long as the purpose and effect of the rule are mutual economic advantage of the carriers and shippers, ports and localities are not unreasonably dis-

advantaged. If the rule diverted traffic from Stockton with no advantage to shippers or carriers, the situation would be different from what this record shows. This record shows economies in carrier operations and more efficient service as a result of equalization. I concur in the Examiner's discussion of this evidence.

(5) There was no evidence that the rule inevitably causes different shippers to be treated differently in making equalization payments. The point is made largely by argument that variations in payments were inevitable because of variations in the inland transportation charges caused by variations in weight and origin of shipments. It was also shown that raisin growers do not receive payments equal to the different costs to ports, because of the application of less-than-truckload rates or of regular truck tariff rates where the shipper uses his own truck, and citrus fruit is not dealt with under the rule. These facts do not invalidate the rule, but may show violation of the law in the administration of the rule. If there is cheating by discriminatory administration of the rule or by disregard of the rule for favored shippers, another case is presented not capable of resolution on this record. The rule itself is not at fault in such a case, but rather the conduct of carrier officials.

(6) Dissipation of carrier revenues is not evidence of illegal conduct. Those carriers which spend more money to serve Stockton do so for reasons of self-interest, but voluntary expenditures do not invalidate the rule merely by describing them by the pejorative "dissipation". On the whole, the record showed that for most of the carriers it was less expensive to absorb part of the inland shipper costs than to make the trip to Stockton. No detriment to commerce or contrariety with public interest is shown by these facts.

(7) Carriers serving Stockton are deprived of Stockton cargo as a result of the absorption of the excess inland freight to San Francisco over Stockton, but, equally, carriers serving San Francisco would be deprived of cargo under any other arrangement, and Stockton has not established any superior right to offset the conveniences of the shipping public and carriers. No detriment to commerce or contrariety with public interest is shown by these facts.

(8) Concealment of improper practices by the rule presupposes the existence of improper practices being concealed, but none was proven. All that was produced were speculative possibilities and testimony of what one witness called "improper practices". Opinions are not proof. There has been no adjudication of the illegality asserted by the opinions, even assuming the rule itself were proven inevitably to cause illegal conduct. If conduct is shown to be illegal, it will have to be punished by some other means than invalidation of the rule which will harm all carriers following the rule, but leave the guilty party unpunished.

The exceptions related to section 15 should be overruled.

(b) Exceptions related to violations of section 16.

(1) The determination of the correct amount of the equalization payment under the rules was found as a practical matter to be possible and no individual carrier's guilt in cheating on computations was proven. Complainant, by inference and argument, has only sought to prove that "it leaves the door open to undue preference and prejudice between shippers" and has argued that the possibility is inevitable. Complainant treats the rules themselves as the malefactor. (See par. XIII, subparagraphs 3 and 4, Complaint.) Section 16 applies to common carriers either alone or in conjunction with any other person directly or indirectly, and the prohibited acts in specific instances by named persons must be proven to establish a misdemeanor.

No such acts have been linked up with any respondent on this record. If the instances involving the raisin growers, or truckers using their own trucks, or citrus fruit shippers are thought to prove misdemeanors, the testimony without documentary proof in this record is inadequate. We should have exhibits showing similar transactions and disparate treatment deviating from what the rule purports to do.

(2) For the same reasons the testimony regarding different treatment of shippers was inadequate because not connected with any instances of specific wrongdoing.

(3) The charges that improper equalization practices are "concealed" or that the rule serves as a "cloak" for improper practices are innuendoes and equally faulty as substitutes for proof of misdemeanors.

No violation of any provision of section 16 has been proven, and the exceptions related thereto should be overruled.

(c) Exceptions related to violations of section 17.

Under the first paragraph of section 17, complainant, after stating it is "in competition as a port and a terminal with San Francisco . . ." (Complaint, par. XII), alleges the rule causes "charging and collecting . . . rates and charges that are unjustly discriminatory between shippers and ports . . ." (Complaint, par. XII (5)).

The preceding report answers, first, on precedent such payments were authorized in *Beaumont Port Commission v. Seatrain Lines,* 2 USMC 699 (1943) and, second, on definition the "natural" flow of overseas traffic from the San Joaquin Valley has always been through the Golden Gate. Neither precedent nor definition, however, explains why the standards of the statute are not disregarded by charging the same ocean transportation rates from both ports, and then by paying those shippers who might otherwise choose Stockton a part of their inland transportation

cost as an inducement to choose San Francisco instead. There is no doubt Stockton is going to be discriminated against by this practice and is entitled to a reasonable explanation of why any discrimination is or is not unjust other than that the act has been done before in Texas or that, before Stockton spent its money for a port, traffic went through the Golden Gate anyway, and that traffic is just as "naturally tributary" to San Francisco as to Stockton.

Stockton makes the very reasonable and compelling argument that if a port invests millions of dollars in development largely with public money, it is entitled to all the cargo that may be sent to the port cheaper than to any other port. Certain formulas using constructive mileages to delineate areas are used to establish inland transportation costs. The cargo that may be sent to the port easier than to any other port is then called local tributary traffic, as I understand the argument. Stockton says other ports may not take away this local tributary traffic, nor take away the advantages of getting cargo to Stockton by equalization payments to shippers. My answer is Stockton has no such rights by virtue of expenditures or the existence of a "natural" flow or local tributary traffic and, absent such rights, the discrimination induced by the carriers' refunds and exercised by shippers is not unjust.

The justification for public investment in port construction comes before, not after, the investment. The investment depends on commercial potentialities, not on future rights. Once made, the investment does not thereafter create legal rights to a flow of business or entitle anyone to anything, but only creates opportunities to exploit. The only creator of opportunity or business values now claimed by Stockton as a matter of right or entitlement is the peculiarity of the same ocean freight rates from Stockton as from San Fran-

cisco in spite of longer travel time and distances. The peculiarity of such rates from Stockton was created by the carriers, not by Stockton. It is not unjust that the rate equality is eliminated by the absorption of partial inland transporting costs because the carriers have only eliminated what they created in the first place. Nothing is taken away that Stockton was entitled to, such as values it created. The consequences to public investment in ports are the consequences of past decisions to locate a port where business potentialities may never be fully realized rather than by denial of rights resulting in unjust discrimination.

Natural flow of traffic and local tributary traffic arguments are equally unfounded, being based on a supposition of vested rights to traffic based on mileages to ports regardless of economic considerations. Such rights have no relation to commerce which, as I see it, may not exclude monetary factors. Shipper choices and port and carrier benefits depend on savings to shippers. There is no such thing as a local tributary measure based on mileage formulas alone translated into rights to certain business regardless of cost. A local tributary measure must be related to transportation costs and there is no unjustness in offering shippers a saving in choosing one port over another, the geography of this case being what it is, as long as all are treated equally.

There is no unjust discrimination between shippers and ports, and the exception as to a violation of the first paragraph of section 17 should be overruled.

No consequence of the rule on the absorption of part of inland freight costs relates to a regulation or practice connected with the receiving, handling, storing, or delivering of property within the meaning of the second paragraph of section 17. *Beaumont Port Com'n v. Seatrain Lines,* 3 FMB

556 (1951). Neither the payment to the shipper measured by inland freight nor a reduction in rates involves receiving, handling, or storing of property, but involves transportation. The exception as to a violation of the second paragraph of section 17 should be overruled.

(d) Exceptions related to violations of section 18(b)(1).

(1) The amount of the payment was found above to be determinable from a reading of the rule and this is all that section 18(b)(1) requires. Section 18(b)(1) requires filing only of "rates and charges . . . for transportation to and from United States ports and foreign ports and between all points on its own route . . .".

(2) Determination of payments, while difficult, is possible. The objective of the rule and the guiding measures are stated and testimony disclosed precisely how payments were calculated in given instances. The unworkability of the rule was not proven. Three situations were alleged where payments may not have followed the rule, but there was no specific evidence. As noted earlier, if specific instances of discriminatory treatment or dishonesty in the application of the rule are shown, adjudication and punishment, if guilt is found, may be undertaken in separate proceedings.

The exceptions related to section 18(b)(1) should be overruled.

2. The statements regarding geographical location.

The Examiner's statements regarding the geographical location of Stockton and San Francisco are that we are dealing "with a single port as against another port in the same geographical area—in fact in the same harbor complex" and that ". . . both ports . . . may be described as San Francisco Bay ports . . .". Stockton is up the Sacramento

River and a long way from San Francisco Bay. The statement may be inaccurate, but the entire statement concluding with "Stockton simply does not exist as an ocean port separate from the Golden Gate" serves the useful purpose of highlighting the dominating geographical fact of this case, and of recognizing the geographical fact which prevents Stockton from having superior rights over San Francisco. The fact is that, to serve Stockton once, a carrier must go through the Golden Gate and pass San Francisco at least twice. If Stockton is served, so inevitably is San Francisco. Both carrier and shipper efficiency result by one stop and a shorter ocean journey. The total journey by land and sea is the same for the shipper in either case. The port in this journey at which commerce is best served on the facts of this case is, partly at least, where there is a concentration of services, particularly if it is a large port that has to be passed in any event. Arguments about "natural" flow of commerce or tributary territory prove little because success of the arguments depends on from where you measure the flow. I understand the Examiner to be saying in effect that detriments to commerce have to take this dominating fact into consideration, and the measuring point for territory "naturally" tributary or the point where the "natural" flow ends is not Stockton, but the Golden Gate. Unless carriers and shippers can avoid San Francisco by going to Los Angeles or somewhere else on the Pacific Coast, they should be able to make the most efficient arrangements possible to get cargo past the Golden Gate. Any inaccuracy in the statement does not negative the correctness of the essential point. The second exception should be overruled.

3. The statements regarding geographical relationships.

The statement regarding Texas City, Houston, Galveston, and Beaumont, Texas, is appropriate because ships serving

Texas City and Houston must pass Galveston coming in or going out to sea or may avoid Galveston by going to Beaumont north up the Gulf Coast to obtain inland shipments. The comparison with San Francisco and Galveston and Beaumont and Los Angeles is accurate. The third exception should be overruled

4. The statement regarding naturally tributary territory.

The fourth exception should be overruled for the reasons given in 2 above.

5. The statement that existing decisions determine disapproval.

The existing decisions hold that Beaumont, Texas, not being "within the Galveston Bay group" and Texas City being in such group, a carrier might compete for traffic by means of an absorption of inland freight without violating the law because traffic through Beaumont was not "naturally tributary to Texas City" which was served by the absorbing carrier. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 USMC 699 (1943). The precedent is applicable and supports the ruling in 3 above. The fifth exception should be overruled.

6. The conclusion that the rules comply without filing inland rates.

The conclusion that the filed equalization rules comply with section 18(b)(1) without filing any inland carrier rates is supported by the reasoning that the amount of the payment is determinable from a reading of the rule. Section 18(b)(1) applies to "the rates and charges" of a carrier "for transportation to and from United States ports and foreign ports". Respondents fixed their ocean rates and the same rate applies from every terminal port. The equalization is another transaction involving a payment based on inland costs pursuant to a prescribed formula. The sixth exception should be overruled.

7. The conclusion that the record does not support findings.

For the foregoing reasons the record supports a finding and conclusion that as a practical matter the determination of payments is possible. The seventh exception should be overruled.

8. The statement that the rules do not discourage use of Stockton.

The Examiner's statements that the application of the equalization rules does not discourage use of Stockton or divert traffic from its natural flow are not determinative of the issues. The rules undoubtedly discourage use of Stockton by those nearer Stockton who have lower inland transportation costs to a port, but can ship just as cheaply from San Francisco as a result of the rule. Such discouragement, however, does not establish violation of any laws giving Stockton any protected rights to be used instead of San Francisco. Diversion of traffic from "natural flow" supposes a predetermined natural flow which does not exist. The direction of traffic is determined from moment to moment and operates in the future as each shipper decides where his self-interest is best served. The so-called natural flow is something only seen in retrospect as the collective results of decisions, not a preordained condition that dictates rights to have business. Complainant's reliance on diversion of a natural flow as a violation of rights apart from other malpractices is misplaced on the facts of this case, regardless of the Examiner's statements. The eighth exception should be overruled.

9. The statement that Stockton does not provide adequate service.

The facts showed that at Stockton certain general cargo operations were inconvenient and involved added expense,

transit and berthing difficulties exist, and government inspections required for export were not available, substantiating the statement that Stockton does not provide adequate service for some general cargo shipments. The uneconomic nature of cargo available at Stockton is shown by the fact that the commodities affected by equalization rules average 40 tons per shipment, and in 1961 71% of all Trans-Pacific Conference ships calling at Stockton loaded as little as from 0 to 50 tons of general cargo per departure (Exh. 52). The commodities concerned are largely condensed milk, raisins, instant coffee, hides, and lumber (Exh. 11). Witnesses agreed there was not enough cargo to support regular berth service.

The ninth exception should be overruled.

10. The statement that the rules are not discriminatory.

The statement that the rules and practices are not discriminatory is substantiated by the reasoning in support of the conclusion there has been no violation of section 16. The tenth exception should be overruled.

11. The statement that there is no discrimination between shippers.

The eleventh exception concerning unjust discrimination should be overruled for the reasons given in 10 preceding.

12. The statements regarding the profitability of equalization.

The statements regarding the profitability of equalization are not determinative of any issues. The claims regarding "dissipation" of carrier revenues as having an adverse effect on commerce were not substantiated by fact any more than the Examiner's statement.

The twelfth exception should be overruled.

13. The statement that the rules no not facilitate malpractices.

Each malpractice occurring as a result of the rules must be adjudicated by proof of specific acts with guilt individually assessed. Any malpractices are the results of actions by people, not the rules. The rules equally permit legitimate practices. If the rules facilitate malpractices, the perpetrators of the malpractice, not the enactors of the rule, must be blamed. The diversion-of-cargo part of the statement excepted to has been discussed above and ruled not controlling.

The thirteenth exception should be overruled.

14. The findings and conclusions with respect to citrus fruit.

The Examiner's findings and conclusions with respect to citrus fruit are that certain allowances are made at the rate of 15¢ per carton for fruit originating in "Southern California" and shipped from San Francisco. This allowance has nothing to do with Stockton and is not pursuant to the rule, but is simply a practice which is not in accordance with or pursuant to the tariff. The Examiner correctly found section 18(b) of the Act was being violated, but the violation is outside the scope of the Complaint. Neither the Examiner's nor the majority's report herein contains any express recognition of the provision of law that whoever violates any provision of section 18(b) shall be liable to a penalty for each day a violation continues. The omission, however, does not mean that there is approval of the "equalization practice" with respect to such commodity even if a rule is put in the tariff. The finding of law violation is enough. The issue of future validity will still have to be passed on, but in the meantime past lawbreaking is not validated. The fourteenth exception should be overruled.

B. Pacific Westbound's exception:

The basis of the respondent's exception is that the Examiner made no findings to support his conclusion as he is

required to do under section 8(b) of the Administrative Procedure Act, and there is no evidence on which to base the conclusion. Other than a factual statement that the number of shipments was small but the tonnage substantial and that the Golden Gate is 423 miles north of Los Angeles, there are no findings. These particular facts are neither analyzed as findings nor connected by any reasoning whatever with the abrupt conclusion that the record does not support a conclusion the territory tributary to Los Angeles (Wilmington and Long Beach) overlaps "that of the San Francisco Bay area ports". It does not "follow", nor do the findings support the announced conclusion. Statements of fact followed by the announcement of conclusions are not enough. Reasoning is needed to connect the two. Accordingly, the exception might have been sustained. My colleagues, however, supplied the reasoning by stating that (a) where the "absorption destroys the right of ports to traffic originating in naturally tributary areas", (b) where service at the ports equalized against is adequate, and (c) where the record shows the substantiating details, there is an unlawful diversion. Neither this reasoning nor the factors in (b) and (c) were in the Examiner's decision, and it is not supplied by any correct setting forth of "the legal test". Accordingly, the deficiency is adequately remedied and the exception may be ruled no longer material to the decision.

Based on the foregoing rulings, I would conclude on the issues:

1. Past approval of agreements filed by respondents should not be withdrawn and disapproval substituted pursuant to section 15. The agreements should remain approved.

2. No misdemeanors should be found for violation of section 16 because of lack of proof.

3. No violation of section 17 has been proven.

4. No violation of section 18(b), as charged in the complaint herein, has been proven.

Appendix D

Conference Member Lines Who Are Respondents Herein

1. Members of Pacific Westbound Conference

AMERICAN MAIL LINE, LTD.

AMERICAN PRESIDENT LINES, LTD.

ISTHMIAN LINES, INC.

JAPAN LINE, LTD.

KAWASAKI KISEN KAISHA, LTD.

KLAVENESS LINE—
- Skibsaktieselskapet Solstad
- Skibsaktieselskapet Siljestad
- Universal Trading & Shipping Agency Aksjeselskap

KNUTSEN LINE—
- Dampskibsaktieselskapet Jeanette Skinner
- Skibsaktieselskapet Pacific
- Skibsaktieselskapet Marie Bakke
- Dampskibsaktieselskapet Golden Gate
- Dampskibsaktieselskapet Lisbeth
- Skibsaktieselskapet Ogeka
- Hvalfangstaktieselskapet Suderoy

DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB
AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG
(A.P. Moller, Maersk Line)

MARITIME COMPANY OF THE PHILIPPINES

NEDLLOYD & HOEGH LINES
- N.V. Nedlloyd Lijnen
- Skibsaktieselskapet Arizona
- Skibsaktieselskapet Astrea
- Skibsaktieselskapet Aruba
- Skibsaktieselskapet Noruega
- Skibsaktieselskapet Abaco
- A/S Atlantica

NIPPON YUSEN KAISHA, LTD. (N.Y.K. LINE)

OSAKASHOSEN MITSUISENPAKU KAISHA, LTD.
(Mitsui O.S.K. Lines, Ltd.)

PACIFIC FAR EAST LINE, INC.

SHOWA SHIPPING CO., LTD.
(SHOWA KAIUN KAISHA, LTD.)
"SHOWA LINE"

STATES MARINE LINES, INC.
(Global Bulk Transport Incorporated)

STATES STEAMSHIP COMPANY

UNITED PHILIPPINE LINES, INC.

WATERMAN STEAMSHIP CORPORATION

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.
(Yamashita-Shinnihon Line)

FERN LINE
Skibsaktieselskabet Varild
Aksjeselskapet Marina
Aktieselskabet Glittre
Dampskibsinteressentskabet Garonne
Aktieselskapet Standard
Fearnley & Eger Befragtningsforretning A/S
(As one member or party only)
Fearnley & Eger

P & O ORIENT LINES

WILHELMSENS DAMPSKIBSAKTIESELSKAB
A/S Den Norske Afrika—Og Australielinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart V
A/S Tankfart IV
A/S Tankfart VI

2. Members of Pacific-Straits Conference

AMERICAN MAIL LINE, LTD.

AMERICAN PRESIDENT LINES, LTD.

ISTHMIAN LINES, INC.

KLAVENESS LINE
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad

Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
Universal Trading & Shipping Agency Aksjeselskap

KNUTSEN LINE
Dampskibsaktieselskapet Jeanette Skinner
Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden Gate
Dampskibsaktieselskapet Lisbeth
Skibsaktieselskapet Ogeka
Hvalfangstaktieselskapet Suderoy

DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB
AKTIESELSKABET DAMPSKIBSSELSKABET SVENBORG
(A.P. MOLLER-MAERSK LINE)

NEDLLOYD & HOEGH LINES
N.V. Nedlloyd Lijnen
Skibsaktieselskapet Arizona
Skibsaktieselskapet Astrea
Skibsaktieselskapet Arubo
Skibsaktieselskapet Noruega
Skibsaktieselskapet Abaco
A/S Atlantica

SHOWA SHIPPING CO., LTD.
(SHOWA KAIUN KAISHA, LTD.
"SHOWA LINE")

WILHELMSENS DAMPSKIBSAKTIESELSKAB
A/S Den Norske Afrika—Og Australienlinie
A/S Tonsberg
A/S Tankfart I
A/S Tankfart V
A/S Tankfart IV
A/S Tankfart VI
(BARBER LINE)

FERN LINES
Fearnley & Eger and
A.F. Klaveness & Co., A/S
Skibsaktieselskapet Varild
Skibsaktieselskapet Marina

Aktieselskabet Glittre
Dampskibsenteressentskabet Garonne
Skibsaktieselskapet Standard
Fearnley & Eger Befragtningsforretning A/A/S
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
Universal Trading & Shipping Agency Akjeselskap

KAWASAKI KISEN KAISHA, LTD.

PACIFIC FAR EAST LINE, INC.

P & O ORIENT LINES

STATES STEAMSHIP COMPANY

3. Members of Pacific/Indonesian Conference

AMERICAN PRESIDENT LINES, LTD.

P.N. DJAKARTA-LLOYD

ISTHMIAN LINES, INC.

KLAVENESS LINE
Skibsaktieselskapet Sangstad
Skibsaktieselskapet Solstad
Skibsaktieselskapet Siljestad
Dampskibsaktieselskabet International
Skibsaktieselskapet Mandeville
Skibsaktieselskapet Goodwill
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AKTIESELSKABET DAMPSKIBSSELSKABET SVENBORG
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A/S Tonsberg
A/S Tankfart I
A/S Tankfart V
A/S Tankfart IV
A/S Tankfart VI
(BARBER LINE)

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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 1064

STOCKTON PORT DISTRICT,

Petitioner,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC / STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA,

Respondents.

Brief of Respondent Pacific Westbound Conference in Opposition to Petition for Writ of Certiorari

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TABLE OF AUTHORITIES CITED

Cases	Pages
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Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission, 314 F.2d 928 (9th Cir. 1963)	5

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References to the Record, "R" are to the pages (1 to 1355) of the Federal Maritime Commission Record. References to Record, Volume 1, "R. Vol. 1," are to the 8-page Record of Proceedings Held in the Court of Appeals for the Ninth Circuit.

All emphasis supplied.

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Respondents.

Brief of Respondent Pacific Westbound Conference in Opposition to Petition for Writ of Certiorari

I.

STATEMENT OF THE CASE

This respondent does not dispute that this Court has jurisdiction and that the petition is timely.

Respondent Pacific Westbound Conference (PWC) was the principal defendant in the complaint proceeding brought by the petitioner Stockton Port District before the Federal Maritime Commission. After extensive hearings a Commission Examiner upheld the validity of respondent's tariff

rule authorizing ocean carriers to equalize the difference in cost of inland transportation as between the ports located in the San Francisco Bay Harbor Complex so as to make the shipper's cost of overland transportation from his inland port of origin the same to any such port. The Commission concurred in the Examiner's decision and the Court of Appeals for the Ninth Circuit affirmed.

In proceedings before the Commission, Stockton claimed that cargo originating in inland points closer in "constructive mileage"[1] to Stockton than any other port on San Francisco Bay and its connecting waterways was its "exclusive preserve". Under its tariff rules, respondent ocean carriers absorb the difference in inland transportation costs between shipping to terminal ports located nearest to the shipper and the costs of shipping via the terminal port more distant from the shipper. Stockton asserted that, by virtue of equalization, it was deprived of cargo which would otherwise move over its docks and to which it was legally entitled.

Specifically Stockton claimed equalization was unjustly discriminatory, unfair and unduly prejudicial to it in violation of Sections 15 and 16 of the Shipping Act, 1916, as amended; contrary to Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920, as amended; contrary to the public interest in violation of Section 15 of the Shipping Act, 1916, and unjustly discriminatory, unfair and unduly prejudicial as among shippers in violation of Sections 15 and 16 of the Shipping Act, 1916.

---

1. The Commission defined "constructive mileage" in Footnote 6, R. 1279, as follows:

> "6. Constructive mileage is actual mileage weighed by such factors as the number of traffic lights and bridges, the presence or absence of mountainous terrain, the condition of the highways and other factors affecting truck traffic."

On the basis of extensive and, in part, conflicting evidence the Commission adopted findings of fact as found by the Examiner:

All ports on San Francisco Bay and its connecting waterways, served via the Golden Gate, are part of one "San Francisco Bay Harbor Complex" and within the same geographical area. (Examiner, R. 1245; Commission, R. 1277.)

All San Francisco Bay Harbor Complex ports naturally serve the same inland geographical area; that the "territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay Area ports". (Examiner, R. 1250; Commission, R. 1281.)

Having made these findings of fact, the Commission resolved the mixed question of fact and law regarding the alleged unjust discrimination to Stockton in violation of Sections 15 and 16 of the Shipping Act, 1916. In so doing the Commission specifically considered the Congressional policy reflected in Section 8 of the Merchant Marine Act, 1920, and its own prior decisions. These conclusions were essentially the same as those of the Examiner.

The Commission rejected Stockton's contention that it had any exclusive claim to cargo originating in areas closest to it based on Stockton's constructive mileage theories or otherwise, concluding that the equalization complained of is not unlawful. (Examiner, R. 1250; Commission, R. 1279.)

The Commission further concluded that equalization does not deprive Stockton of any cargo which was exclusively and naturally tributary to Stockton and that equalization was therefore not unjustly discriminatory or unfair, or unduly prejudicial to Stockton in violation of the Shipping Act, 1916, or in violation of any Congressional policy. (Examiner, R. 1250-51; Commission, R. 1278-81.) Contrary to Stockton's contentions (Pet., pp. 5, 7, 12, 13), this conclusion

did not rest upon the benefits to shippers and carriers resulting from equalization. (R. 1279).

The Commission also concluded that equalization is not unjustly discriminatory or unfair as between shippers, or contrary to the public interest. In this connection the Commission recognized the public interest to be larger than the needs or desires of the Stockton area and found equalization "reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification." (Examiner, R. 1254; Commission, R. 1285)

Stockton's claims were rejected by the Examiner and by the Commission which confirmed without material change the Examiner's findings and conclusions. Stockton renewed its claims in all respects material here before the court of appeals. After characterising the Commission's findings and conclusions as "complete and elaborate", the court held: "(They) do have warrant in the record, a reasonable basis in law, and are supported by substantial evidence." (R. Vol. 1, p. 6)

II.

THE QUESTION PRESENTED

The issues raised by petitioner before the Commission and to the court of appeals were questions of fact or mixed questions of fact and law. The only question presented by this petition is whether the determinations made by the Commission based on findings of fact and on resolution of mixed questions of fact and law, have a reasonable basis in law and are supported by substantial evidence.

III.

ARGUMENT

A. The Limited Scope of Judicial Review.

Petitioner agrees that in denying Stockton's petition for review, the court of appeals did not pass upon or consider

its contention that "port equalization violated the policy and intent of Congress as set forth in various statutes and certain action of Congress" (Pet. p. 6). The sole function of the court of appeals was to review the agency decision within the accepted standards for review. This it did.

The court of appeals stated:

> ". . . the very complete and elaborate decision of the Maritime Commission discloses that its conclusions do have warrant in the record, a reasonable basis in law,[2] and are supported by substantial evidence" (R. Vol. 1, p. 6).

It has long been true that upon review of an administrative decision, the question before the court is a limited one; namely, whether the decision has reasonable support in the record and in the applicable law. The court is not at liberty to substitute its judgment or discretion for that of the agency. This Court recently has had occasion to explain the reason for such limitations as follows:

> "Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute."
>
> *Consolo v. Federal Maritime Commission*, 383 U.S. 607 at 620 (1966). (Footnote omitted).[3]

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2. The phrase "a reasonable basis in law" was adopted from the decision of this Court in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 at 131 (1944).

3. The reliance by the court of appeals upon *Consolo* and *Trans-Pacific Freight Conference of Japan v. Federal Maritime Comm'n*, 314 F.2d 928 (9th Cir. 1963), is criticized by petitioner which asserts the cases are not in point because they involved only questions of fact. We need not argue the matter as to whether only factual questions were involved in those cases. The principles are firmly established and manifestly applicable where, as here, there are questions of fact and mixed questions of fact and law.

Whether or not respondent's tariff rule providing for equalization is valid is a matter to be determined by the Commission in the first instance. Here that determination is one based upon facts and mixed questions of fact and law. Its determination cannot be disturbed except upon a finding that the facts found do not have warrant in the record and no reasonable basis in the law. The deference given by the courts to the administrative agency in fashioning policy pursuant to the statutes which it administers should be observed here. Petitioner presents no issue calling for substitution of the court's discretion for that of the Commission.

B. The Policy of Section 8 Was Not Ignored Below.

The principal contention of the petition is that the Commission based its conclusion that equalization is not unjustly discriminatory or prejudicial to Stockton upon the benefits accruing to shippers and carriers (Pet. pp. 5, 7, 12, 13), thus ignoring Congressional policy as set forth in Section 8 of the Merchant Marine Act, 1920, which petitioner interprets as requiring that the sole consideration be the benefit or detriment to ports. (Pet. pp. 7-13). This position (1) misstates the basis of the Commission's decision, (2) ignores the not insubstantial part of the Commission's decision interpreting and applying Congressional policy, (3) misinterprets Section 8 and (4) even if correctly stated would not call for court interference with agency discretion.

That the Commission's conclusion that the equalization is not unjustly discriminatory or prejudicial to Stockton was not based upon the benefits accruing to shippers and carriers is readily demonstrated. After discussing the benefits accruing to carriers and shippers from, and the effect upon ports of, equalization, the Commission stated:

"Thus, there is ample economic and cost justification for the discrimination against Stockton such as it is. *But even this would not save respondents' equalization* under the applicable precedents were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Stockton." (R. 1279)[4]

The basis for the Commission's conclusion was facts found and determinations made of mixed questions of fact and law to the effect that Stockton had no exclusive right to cargoes it claimed for itself. These findings are based on economics, history and the geography of the San Francisco Bay Harbor Complex ports.

Even if, however, the Commission had based its decision respecting the lack of unjust or undue disadvantage to Stockton by considering the benefits to shippers, carriers and to the public interest, there would be no sound basis for rejecting such determination. As Commissioner Patterson observed in his concurring opinion, as long as the purpose and effect of the equalization rule is to the mutual advantage of shippers and carriers, the ports and localities are not "unreasonably" disadvantaged by equalization within the language of the Shipping Act, 1016[5] (R. 1316-1317). Whether any alleged discrimination or disadvantage suffered by Stockton is unreasonable obviously turns on a determination of facts, a function committed by Congress

4. The Commission did hold *invalid* equalization between Bay Area ports and Los Angeles and Long Beach on citrus fruit originating in Southern California. Los Angeles was not a part of the same geographical area as San Francisco and this equalization practice accordingly did draw cargo "naturally tributary" to a port away from it. (R. 1291). Significantly, the fact that this equalization was also beneficial to the carriers and shippers did not save it from being held invalid.

5. Section 15 (46 U.S.C. 814) and Section 16 (46 U.S.C. 815).

to the expertise of the Federal Maritime Commission (*Alcoa Steamship Company v. Federal Maritime Commission*, 321 F.2d 756, 759 (D.C. Cir. 1963); see also *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937)).

Petitioner charges that the Court of Appeals failed to consider whether Congressional policy and intent renders the equalization unlawful (Pet. p. 15). The policy referred to is that set forth in Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867).[6] It should be observed at the

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6. For ready reference Section 8 of the Merchant Marine Act, 1920, is quoted in full:

"It shall be the duty of the Secretary of Commerce, in cooperation with the Secretary of the Army, with the object of *promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which he has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce;* to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investgate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate *any other matter that may tend to promote and encourage the use by vessels of ports adequate* to care for the freight which would *naturally pass through such ports:* PROVIDED, That if after such investigation the Secretary of Commerce shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the Secretary may submit his findings to the Interstate Commerce Commission for such action as such

outset that notwithstanding the fact that the Commission's decision is replete with references to and consideration of the policy of Section 8 (R. 1275-78; 1280-81), no power, jurisdiction or duty is vested in the Commission with respect to the statute,[7] and in fact the concurring opinion of one of the Commissioners takes the other Commissioners to task for going beyond the Commission's functions and interpreting and applying Section 8 of the Merchant Marine Act, 1920 (R. 1306).

Section 8 is not in any event a statute which requires or compels any legal conclusion be drawn respecting equalization. Section 8, so far as here pertinent, places a duty on *the Secretary of Commerce* in cooperation with *the Secretary of the Army* "with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce . . . *to investigate* territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce . . ." and further, ". . . *to investigate* any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports. . . ." On its face,

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commission may consider proper under existing law. June 5, 1920, c. 250, § 8, 41 Stat. 992; Ex.Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 204, 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277."

7. The Maritime Administration/Federal Maritime Board functions were separated by Reorganization Plan No. 7 of 1961 (46 U.S.C. A. § 1111 (Note)). Under the Plan all promotional functions remained with the Maritime Administration, Department of Commerce, including all functions performed with the Department of the Army under Section 8 of the 1920 Act, and all regulatory functions, principally those under the Shipping Act, 1916, were transferred to the new Federal Maritime Commission.

no duty is imposed even on the branches of the Government to whom the section is addressed *other than a duty to investigate.*

At the very most Section 8 expresses port promotional policies which the Federal Maritime Commission could (and did) in its discretion take into consideration in formulating its own policies under the Shipping Act, 1916. That is all that can be made of the *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), aff'd *sub nom. Pacific Far East Line, Inc. v. United States,* 246 F.2d 711 (D.C. Cir. 1957), on which petitioner relies so heavily (Pet., p. 10).

That case came before this Commission's predecessor, the Federal Maritime Board, which then had the duty and responsibility under Section 8 now vested in the Secretary of Commerce. The Court of Appeals there commented as to the Federal Maritime Board's treatment of the policies set forth in Section 8:

> "While we need not decide that this section (conferring the power to investigate) confers power to act to promote ports, it is indicative of a congressional policy favoring port improvement and development. That policy having been expressed, the Board *could,* if it was not bound to do so, examine the practices here complained of in the light of that policy, and *exercise its power* to approve or disapprove such practices accordingly. The Board did consider this policy in determining whether or not to approve equalization as practiced by the Conference." (246 F.2d at 716)

As the Board did in *City of Portland v. Pacific Westbound Conference, supra,* the Federal Maritime Commission here, though clearly having no duty under the statute, also considered and applied the policies of Section 8.

It pointed out:

> "In seeking to bring itself within the protection of section 8 of the 1920 Act, Stockton relies on its physi-

cal separation from San Francisco Bay proper. But other factors must be considered in making determinations under section 8. Thus, the 'economies of transportation' and the 'natural flow of commerce' are relevant:

> '. . . section [8] requires, all other factors being substantially equal, that a given geographical area and its ports receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. (*City of Portland v. Pacific Westbound*, 4 F.M.B. 664.)' " (R. 1277)

It agreed with the Examiner's conclusion that

> ". . . the ports of Stockton and San Francisco do not represent separate and distinct geographical areas. They are both 'bay area' ports and have been uniformly treated as such for a variety of purposes." (R. 1277)

It considered, in the words of Section 8, "the natural direction of the flow of traffic" and concluded upon examination of the complex factual background that "The natural direction of the flow of traffic from the San Joaquin Valley, which Stockton seeks to have declared its *exclusive preserve*, is through the Golden Gate to the Pacific Ocean. For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton" (R. 1278).

The Commission further reviewed and adopted the findings of an investigation actually undertaken pursuant to Section 8 of the Merchant Marine Act, 1920, jointly by the Maritime Administration, Department of Commerce, and the Corps of Engineers, Department of the Army, the gov-

ernmental agencies charged with administering Section 8. Those findings were that the ports on San Francisco Bay and connecting waterways reached through the Golden Gate have overlapping and common tributary territories, all economically and naturally served by carriers serving any one of such ports. (R. 1280-81),[8]

All of the foregoing demonstrates that the Federal Maritime Commission gave full consideration to Section 8 of the Merchant Marine Act, 1920. Petitioner, accordingly, has no basis to complain that the Commission did not apply the policy of Congress as expressed in Section 8. What petitioner is really objecting to, but does not say so, is that the policy was not applied so as to produce a result favorable to Stockton. Even if it were assumed the Commission had an obligation to apply that policy, it is a matter entrusted to the discretion and expertise of the agency. A reviewing court may not substitute its own view for the judgment of the Commission in such a matter involving complex factual and legal questions as to which there is support in the record.

The fact that Stockton was developed with federal funds is also asserted as creating a Congressional policy which invalidates per se the Commission's approval of equalization within the same geographical harbor complex. (Pet.

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8. The Commission from examination of these studies determined:

> "It is obvious that these studies dictate a rejection of any 'constructive mileage' theory for determining 'naturally tributary territory.'
>
> "We conclude, that for the purposes of this proceeding, the territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. To paraphrase the *Beaumont* decision, *supra*, the territory surrounding Stockton and the entire Bay area is centrally, economically and naturally served by the conference facilities at San Francisco." (R. 1281)

pp. 10-11) Federal funds were also patently used to develop other ports and waterways within that harbor complex. This contention is answered convincingly in the concurring opinion of Commissioner Patterson:

> "The justification for public investment in port construction comes before, not after, the investment. The investment depends on commercial potentialities, not on future rights. Once made, the investment does not thereafter create legal rights to a flow of business or entitle anyone to anything, but only creates opportunities to exploit."[9] (R. 1321-22)

C. The Decision Below Has Only Local Significance.

The petition's assertion that the decision "affects every port in the United States and is highly important to every Port" (Pet., p. 13) is plainly not so. As demonstrated above, the decision was based on findings of fact related to the particular features of the San Francisco Bay Harbor Complex. There are few areas, if any, which have the same economic or geographic features as San Francisco Bay and its connecting waterways. The decision has no national significance. The principal port that it might affect other than petitioner is the Port of San Francisco which is opposing the petition. No ports at any time have intervened on behalf of petitioner.

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9. Commissioner Patterson goes on to point out that the ocean carriers had heretofore benefited Stockton by making their freight rates the same for Stockton as for San Francisco, saying:

> "It is not unjust that the rate equality is eliminated by the absorption of partial inland transporting costs because the carriers have only eliminated what they created in the first place. Nothing is taken away that Stockton was entitled to, such as values it created." (R. 1322)

D. The Method of Review Employed by the Court of Appeals Was Proper.

As a ground for granting the writ, petitioner contends that the court of appeals "did not discuss or even mention" petitioner's legal contentions as to Congressional policy and the necessity for application thereof (Pet., p. 6) and, hence, did not "decide all relevant questions of law" as required by Section 10(e) of the Administrative Procedure Act (5 U.S.C. 706).[10]

We know of no authority (and none is cited) that requires the court of appeals to discuss each question of law presented to it before it can decide that the conclusions of an administrative agency have "a reasonable basis in law". A proscription to "*decide* all relevant questions of law" is not a requirement to *discuss* anything.

The court of appeals made it quite clear why its opinion did not include detailed discussion of all issues. It had before it on review a 32-page Initial Decision of the Federal Maritime Commission's Presiding Examiner (R. 1232-1263), a 27-page majority opinion of the Federal Maritime Commission (R. 1266-1293), a 26-page concurring opinion by one of the Commissioners (R. 1306-1331), and a 7-page opinion by the dissenting Commissioner (R. 1293-1299). The court stated the Commission's report and opinion "fully set forth" the "facts, contentions of the parties, and the rulings of the Commission." (R. Vol. 1, pp. 4-5). In view of this, the court said, "We deemed it unnecessary therefore to recite these matters in the opinion of this court" (R. Vol. 1, p. 5). It was the expressed view of the court that "the

10. It would seem logical and appropriate that if a court of appeals failed to consider an important relevant point of law the party which raised it should call the omission to that court's attention by petition for reconsideration before seeking redress from the overburdened Supreme Court. This petitioner did not do.

very complete and elaborate decision of the Maritime Commission discloses that its conclusions do have warrant in the record, a reasonable basis in law, and are supported by substantial evidence" (R. Vol. 1, p. 6).

The court of appeals thus correctly applied the rules as to the scope of its review. It was not "a departure from the accepted and usual course of judicial proceedings" (Pet., p. 16) that the court did not recite in detail, as we have here, the Commission's factual findings and its consideration of mixed questions of fact and law in applying those facts and the policies of the Merchant Marine Act, 1920, to the objectives of the Shipping Act, 1916, to reach the conclusion that respondent's equalization rule was not invalid.

IV.

CONCLUSION

The foregoing amply demonstrates that the Petition for Certiorari is not well founded and should be denied.

Dated: March 15, 1967.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EDWARD D. RANSOM, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent respondent Pacific Westbound

Conference and its member lines in the above-entitled matter, in whose behalf service of the foregoing Reply Brief has been effected as herein stated.

I certify that on or before March 15, 1967 I served the foregoing Brief of respondent Pacific Westbound Conference by service of three (3) copies upon the attorneys for petitioner, three (3) copies upon the Solicitor General of the United States, three (3) copies upon attorneys for the Federal Maritime Commission, and three (3) copies upon the attorneys for each of the other respondents, by mailing the same, postage prepaid, airmail to addressees in Washington, D. C. and first class mail to the other addresses, as follows:

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SUPREME COURT, U. S.
MAR 15 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1064

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA,
Respondents.

Opposition of Respondent State of California to Petition for Writ of Certiorari

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Respondents.

Opposition of Respondent State of California to Petition for Writ of Certiorari

I.

QUESTION PRESENTED

Respondent State of California, appearing here on behalf of its agency, the San Francisco Port Authority, takes issue with the question presented by petitioner on the ground the question omits an important element inherent in the decision of the Federal Maritime Commission and affirmed in the decision of the Court of Appeals. Both deci-

sions found lawful a practice of the steamship carriers providing for equalization of inland transportation rates from one port in the San Francisco Bay area complex to another port in the San Francisco Bay area complex. The question as presented by petitioner would lead this Court to believe the Commission and the Court of Appeals had approved all equalization practices. This is not a fact; equalization permitted by the Commission's decision is limited to a unified geographical area.[1]

II.

BASIS UNDER RULE 19 WHY WRIT OF CERTIORARI SHOULD NOT ISSUE

There is no conflict in decisions between the Court of Appeals on the same matters, nor is the decision of the Federal Maritime Board in an earlier case inconsistent with its decision in this case. Petitioner in stating his question appears to indicate such conflict exists. He cites two decisions, one by the Federal Maritime Board and one by the Court of Appeals of the District of Columbia. Both decisions grew out of the same proceeding. The Federal Maritime Board decision, reported in *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), arose on a complaint of the City of Portland, Oregon and the Port of Seattle, Washington, based on objection to an equalization practice which, it was claimed, diverted traffic originating in Washington, Oregon, Idaho and Montana from complainants' ports to California. In general, the Commission agreed the equalization practice complained of was improper because it did take traffic from territory

1. The opinions of the Commission and the Court of Appeals are correctly referred to in the petition and are included in its appendix. References will be made to the appropriate pages of the appendix of petitioner to avoid the necessity of reprinting.

naturally and geographically tributary to complainants to a location hundreds of miles away. The order, however, did not strike down all equalization practice. The administrative tribunal did exactly what it must do in all cases. It weighed all of the economic factors properly before it, including interests of shippers, steamship companies, commerce, and the ports. The Commission specifically held that whether diversion of traffic is unjust or unfair discrimination, or undue or unreasonable preference, is a question of fact to be determined in each specific instance (page 674). Based on this rationale, the Commission held the practice of equalization on apples, and other deciduous fruit, among the more important cargoes moving under equalization, was not improper. It also found equalization on dairy products was permissible. It further held it would keep these matters under review and when reasonably adequate service was provided from the northwest, would prohibit equalization. Some forms of equalization were prohibited by the decision. While the administrative tribunal did refer to Section 8 of the Merchant Marine Act of 1920 as an indication of a policy expressed by Congress, the Commission's decision is based on interpretations of the Shipping Act which governs its jurisdiction.

Equalization practiced between California and the northwest is quite different from equalization practiced within one harbor complex. But even if this were not so the decision is not inconsistent with the holding before this Court, because both in the Portland decision and in the instant case in determining value to the public the Commission based this decision on the same considerations as the Portland case, to wit: the interests of commerce, value to the shippers, value to the steamship companies, and the interests of the ports.

The Circuit Court opinion cited by petitioner is *Pacific Far East Line v. United States,* 246 F.(2d) 711 (C.A.D.C. 1957.) In that case one of the steamship lines before the Commission in the administrative hearing cited above, appealed from the Commission decision disapproving equalization on explosives. Originally the Board had held that equalization as to explosives from Washington to the Philippines had been justified on the ground of inadequate service and would be justified until approximately monthly sailings were available. It also found one sailing a month was adequate to meet the needs of shippers. The Board had subsequently been advised that a Dutch line would begin making monthly sailings from an anchorage outside Seattle to the Philippines. It then concluded equalization on explosives was no longer justified, except that if the shipper could not get space when needed special equalization could be made (page 714).

The Court of Appeals held the Commission's order was proper, basing its decision on Sections 15, 16, and 17 of the Shipping Act of 1916. It did not base its affirmance on Section 8 of the Merchant Marine Act, but found the Administrative Board could take that Act into consideration in considering Congressional policy. What the decision really holds is that the Administrative Board's discretion will be upheld unless an abuse of that discretion is shown. This decision, therefore, is entirely consistent with the decision of the Ninth Circuit Court of Appeals in the instant case.

It is our conclusion that the cases referred to are consistent with the present decision. In addition, the present decision concerns one geographical locality. The cases referred to above concerned equalization in widely divergent geographical areas. We conclude no ground for jurisdiction is stated under Rule 19.

III.

STATEMENT OF THE CASE

The decision of the Court of Appeals, based on the ruling of this Court in the case of *Consolo v. Federal Maritime Commission,* 386 U.S. 607 (1966), correctly held that as a reviewing court it would not substitute its judgment or discretion for that of the administrative agency (App. pp. 6-9). There was no issue of law properly before the Court. The administrative tribunal had interpreted the provisions of law before it correctly and had then rendered an order based on the sound exercise of its discretion. The Court found the order based on substantial evidence, warranted by the record and founded on a reasonable basis in law. *Stockton Port District v. Federal Maritime Commission,* 369 F.(2d) 380 (C.A. 9th, 1966).

The order of the Commission was a proper exercise of the Commission's discretion (App. pp. 10-52; 56-80). The case commenced on the complaint of Stockton, which alleged the port equalization rule resulted in diversion in volumes of cargo and was contrary to all of the Acts referred to in its petition before this Court. The Commission found the conferences had been required to and had set ocean rates identical to all terminal ports. The conferences had also set up a port equalization rule which permitted conference carriers to equalize inland transportation costs between terminal ports. In explaining equalization the Commission said:

> "For example, if from the point of origin of the cargo it will cost the shipper 34 cents per hundred pounds to ship overland by common carrier to the Port of Stockton and 42 cents per hundred pounds to ship overland by common carrier to the Port of San Francisco, the ocean carrier may take the shipment at San Francisco and 'equalize' the added inland cost by reimbursing the

shipper for the excess of 8 cents per hundred pounds which it has cost him to ship via San Francisco instead of Stockton." (App. p. 12).

The Commission points out that the conference permits transshipment. In the case of transshipment a shipper ships to the terminal and pays his own inland transportation costs. The steamship company then picks up the goods at the terminal, rehandles the goods, pays terminal costs, but actually loads the goods at another port or terminal. Terminal costs are, therefore, double. Transshipment costs the vessel approximately $6.00 to $7.50 per ton; equalization costs the vessel on the average $2.00 to $2.50 per ton. (App. p. 19). As the Commission states, it is not always convenient for vessels to actually call at Stockton. If the volume of cargo is not sufficient the call will not be warranted. It is an 8-hour trip in each direction to reach Stockton from the Bay area. There is, therefore, additional transit time, pilotage, tugs, and other expenses. Estimates of these costs range from $3000 to $4000 per voyage.[2]

Weighing these considerations, the Commission found that equalization gave a vessel latitude in loading, scheduling, and the ability to avoid uneconomical calls. Transshipment is at least three times as expensive and requires unnecessary rehandling of merchandise (App. pp. 18-19).

The Commission next discussed the testimony of the shippers, who, with but few exceptions, strongly favored equalization (App. pp. 19-20). Both the Examiner and the Commission found the equalization on citrus fruit from the Los Angeles area unjustly discriminatory and unfair. In this instance, equalization was being attempted between divergent geographical areas, to wit: Northern California

2. Other estimates were even higher. (App. p. 66).

and Southern California. No appeal was taken from this portion of the order.

On the other hand, after weighing the equities, the Commission found San Francisco and Stockton were of the same harbor complex and that equalization between ports in the same geographical area was not contrary to any of the statutes referred to by petitioner. It further found that the territory which was naturally tributary to Stockton was also tributary to San Francisco. Stockton disagreed with the latter conclusion on the ground that naturally tributary territory means the area from which inland transportation rates are less. The Commission properly found there was no such simple test of a "naturally tributary territory." The test must concern itself with the economies of transportation and natural flow of commerce. In this case the natural flow of commerce from the area Stockton sought to have delineated as its exclusive preserve, is through the Golden Gate to the Pacific Ocean. It found that San Francisco, which had been built in reliance on this traffic and had operated for almost a hundred years prior to the existence of Stockton, did not cease to be a port merely upon the creation of Stockton (App. pp. 25-26).

The Commission went extensively into the economics, pointing out the costs to the shippers, to the steamship companies, and disposing completely of Stockton's claim of hardship. In this connection it states:

> ". . ., Stockton's growth since 1957 has put it ahead of the ports of San Francisco, Oakland and Alameda combined, in export tonnage. General cargo (via conference and non-conference vessels) to conference destinations increased by over 50% in 1962 over 1961, although total cargo to conference destinations declined from 1,308,558 tons to 1,108,726 tons. Thus, equalization has not seriously affected Stockton's competitive position." (App. pp. 36-37).

Before entering its order the Commission discussed at considerable length each of the statutory provisions which petitioner raises in this writ. We find no error in its interpretation of the statutes.

The gist of the majority decision sets forth and applies the following legal test:

> ". . .: If the absorption of inland rate differentials destroys the right of ports to traffic originating in the areas naturally tributary to them, the absorption is unduly prejudicial to such ports where service from the port equalized against is adequate." (App. p. 41).

By its order the Commission finds that if the equalization rule does not go beyond the naturally tributary territory the equalization rule may be properly applied.

One Commissioner dissented from the opinion. His conclusions are not supported in the record and in our opinion are not correct interpretations of the law governing the decisions of the Commission.

IV.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

It is our position that the order and opinion are correct and, therefore, that certiorari does not properly lie.

Every statute referred to by petitioner was considered and interpreted. The basic considerations before the Commission were whether a fundamentally sound economic device created *undue* or *unreasonable* preference or advantage to any locality, or subjected any locality to any *undue* or *unreasonable* prejudice or disadvantage. (Emphasis ours.) (Section 16 First and Second of the Shipping Act of 1916; 46 U.S. Code 815, 39 Stat. 734). In making this determination the Commission took into consideration all of the rele-

vant provisions of the Shipping Act and discussed Section 8 of the Merchant Marine Act of 1920 and Section 205 of the Merchant Marine Act of 1936. This is all the Commission was either required or allowed to do under the law.

Section 8 of the Merchant Marine Act of 1920 (App. p. 2) directed the Departments of Commerce and Defense ". . . to investigate territorial regions and zones tributary to . . . ports, taking into consideration the economies of transportation by rail, water and highway and the natural direction of the flow of commerce; . . .". (46 U.S.C. 867.) The Department of Commerce in this connection acts through the Maritime Administration, not the Maritime Commission. The Maritime Administration has made its determinations pursuant to this section for the San Francisco Bay harbor complex in a series of studies, delineated on maps, introduced in this proceeding as Exhibits 47 through 50. The publication shows the tributary territory of Stockton wholly within the tributary territory of San Francisco and largely within the territory of Oakland-Alameda (App. p. 29). The Commission's conclusion, therefore, is entirely consistent with and supported by the Maritime Administration's finding under Section 8 of the Merchant Marine Act of 1920. The Commission itself may not make a finding under Section 8 and, strictly speaking, the interpretation of that statute, contrary to petitioner's contention, is not involved here. Nevertheless, the fact that the determinations are wholly consistent renders any legal question academic.

Section 205 of the Merchant Marine Act of 1936 (App. pp. 3-4) similarly does not govern these proceedings. Here again, jurisdiction is vested in the Maritime Administration, not in the Commission. All the statute purports to do is to prohibit conferences or carriers from preventing other carriers from serving federally assisted ports at different ocean rates. The ocean rates are the same. Even if equali-

zation is considered part of the rate, which it is not, it applies both to and from Stockton. While the Commission did not have the interpretation of the statute before it, it did consider and discuss this provision. (App. pp. 37-38).

There is, therefore, contrary to petitioner's statement, no Act of Congress which prohibits port equalization. On the contrary, the Federal Maritime Commission, vested with the jurisdiction of administering the Shipping Act of 1916 is required to and must weigh the relevant factors. In considering public interest, it must consider the benefits to shippers, carriers, and the public. Had it not done so it would have been in error. Congress was not required in the Shipping Act to use such terms as "undue" and "unreasonable"; it did so because it wished to have the equities weighed.

It is not true that the decision affects ports generally. The order of the Commission is limited to areas where there is a clear geographical relationship. Here again, the order of the Commission is correct. The Commission did not, contrary to the statement of petitioner, base its conclusion solely on economics. In finding equalization from the Los Angeles area to the San Francisco area improper, and equalization in the Bay area complex proper, the Commission has clearly delineated the extent of the equalization it will permit.

The Court of Appeals properly found there were no relevant questions of law before it, i.e., that the questions of law before the Commission had been properly decided by the Commission, leaving only the reweighing of the evidence. This the Court correctly decided it would not do. The Court of Appeals specifically found the Commission's conclusions had a reasonable basis in law.

CONCLUSION

We respectfully request the writ of certiorari be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1064

STOCKTON PORT DISTRICT, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 6–9) is reported at 369 F. 2d 380. The report of the Federal Maritime Commission (Pet. App. 11–50, 58–80) is reported at 9 F.M.C. 12.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1966, and the petition for a writ of certiorari was filed on February 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 2350 and 1254(1).

QUESTION PRESENTED

Whether shipping conference agreements and tariff rules which provide for equalization of inland transportation costs on the movement of ocean freight to specified terminal ports are invalid as a matter of law under the anti-discrimination provisions of the Shipping Act, 1916.

STATUTES INVOLVED

Pertinent portions of the Shipping Act, 1916, as amended, the Merchant Marine Act, 1920, as amended, and of other statutes are set forth in the Appendix A to the petition.

STATEMENT

Petitioner is a public corporation which operates the terminal facilities comprising the Port of Stockton, California.[1] It filed a complaint with the Federal Maritime Commission against three conferences of steamship lines and their members,[2] charging that the port equalization rules in their respective tariffs had the effect of diverting cargo from it in violation of Sections 15, 16, 17 and 18(b) of the Shipping Act, 1916, and Section 205 of the Merchant Marine Act, 1936, and in contravention of the principles and policies of Section 8 of the Merchant Marine Act, 1920. The conferences and the San Francisco Port Authority, a State agency which operates the

[1] "Stockton" will be used interchangeably to refer, as the context may require, to the corporation which operates the terminal facilities at Stockton and to the port itself.

[2] All three conferences—the Pacific Westbound Conference, Pacific Straits Conference and the Pacific/Indonesian Conference—operate pursuant to agreements approved by the Commission, from the Pacific Coast to destinations in the Far East.

Port of San Francisco, intervened and generally opposed petitioner's request that the equalization rules be deleted from the conference tariffs. After full administrative proceedings, the Commission held that the rules are not unlawful insofar as they permit equalization of inland transportation charges from the shipper's point of origin to the several terminal ports[3] in the harbor complex of San Francisco Bay, *i.e.*, the ports located on the waterways served through the Golden Gate (the strait connecting San Francisco Bay and the Pacific Ocean).

Ocean freight rates from all terminal ports on San Francisco Bay and its connecting waterways are the same. However, shippers' total costs from these ports would normally vary because the inland transportation rates to the ports vary according to their distance from the inland point of origin. To equalize inland costs among ports served through the Golden Gate, the conferences adopted "port equalization rules." These rules permit the ocean carrier to reimburse the shipper for the difference between his inland costs of delivering to a port of loading designated by the carrier and his inland costs to the nearest port. Thus a shipment originating at a point near Stockton may be loaded at San Francisco—the port nearest to the Golden Gate—at the same costs to the shipper as if it had been delivered for loading at Stockton, some 75 miles from the Golden Gate via inland waterways.

In concluding that the equalization rules are not unlawful as applied to these ports, the Commission took into account the geographical relationship of

[3] Terminal ports are those designated by the conferences as to which the same ocean rates apply (Pet. App. 13).

these ports to each other and to the origin territory (Pet. App. 23–29) and the over-all impact of the rules upon shippers, carriers and ports. It found that the rules on the whole were to the mutual advantage of shippers and carriers and did not have a significant adverse effect on Stockton. As to the shippers, the Commission found that under the rules, they benefit because they obtain more frequent and reliable ocean freight service at no extra cost. As to the carriers, the Commission found significant efficiencies. It takes a vessel which has voyaged up San Francisco Bay, an additional eight hours to reach Stockton, not counting delays due to fog and bridge liftings. The estimated additional voyage cost per vessel runs between $3,000 and $4,000. The carriers therefore benefit by avoiding the extra 75 mile journey for amounts of cargo insufficient to support regular service (Pet. App. 14, 16, 18). Moreover, petitioner's facilities are such that vessels loading both bulk and general cargo must shift between different berths at an additional cost of about $300 (Pet. App. 18, 35). As to Stockton, the Commission found that, despite equalization, it has had a "phenomenal growth", in fact, actually increasing its proportion of total tonnage to conference destinations while the relative share of other ports in the area was declining (Pet. App. 16, 36–37).

The Commission recognized that elimination of the rules might confer some advantages to Stockton although not to the extent claimed by it (Pet. App. 26–27), and perhaps to certain shippers as well (Pet. App. 19). On a comprehensive appraisal of the total

transportation situation, however, the Commission was of the view that "[t]he equalization under consideration here reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification" (Pet. App. 35).[4]

The court of appeals affirmed *per curiam,* declaring that "the very complete and elaborate decision of the Maritime Commission discloses that its conclusions do have warrant in the record, a reasonable basis in law, and are supported by substantial evidence" (Pet. App. 9).

ARGUMENT

The petition presents no substantial question warranting further review by this Court. There is no conflict between the circuits and the decision below is correct.

The only issue raised by the petition is whether the congressional policy favoring port development and improvement condemns port equalization, or similar practices, which divert *any* cargo from a port through which the cargo would otherwise move (Pet. 7–13).[5] Stockton asserts, in effect, that port equaliza-

[4] However, the Commission held that the equalization rules were unlawful as applied to cargo originating in the area close to the Golden Gate ports but in fact loaded at the ports of Los Angeles or Long Beach, some 400 miles away (Pet. App. 41–44). No review has been sought from the portion of the order disallowing the rules as thus applied (Pet. App. 56–57).

[5] Petitioner has abandoned a number of contentions, advanced below, based upon (a) the unlawful rebate provisions of § 16 (Second) of the Shipping Act, 1916, and (b) the anti-discrimination provisions of §§ 15 and 16 (First) of that Act, and (c) the provision of the Fifth Amendment to the Constitution barring the deprivation of property without due process of law.

tion is *per se* unlawful and that the Commission has no discretion whatever to permit it, even if it finds that equalization, in a given situation, (a) is beneficial to shippers and ocean carriers, (b) affects the complaining port only minimally, (c) is confined to ports in the same harbor complex, and (d) is, on the whole, beneficial to the commerce of the United States and the public interest.

Section 8 of the Merchant Marine Act, 1920, 46 U.S.C. 867 (Pet. App. 2–3), on which petitioner principally relies, contains no suggestion of so rigid a Congressional policy. It directs the Secretary of Commerce in cooperation with the Secretary of the Army "with the object of promoting, encouraging and developing ports and transportation facilities in connection with water commerce * * *, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce;" to investigate also the causes of port congestion, the subject of terminal facilities and "any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports * * *." Thus, it simply provides for a continuous study of port development by responsible government agencies. But it does not establish substantive criteria or impose limitations on the power of the Federal Maritime Commission to determine whether particular practices constitute unjust or unreasonable discrimination under Sections 15 and 16 of the Shipping Act. Nor

does it make the policy of port development paramount to all other interests. On the contrary, under the Shipping Act the Commission must—as it did here—give due weight to all of the transportation factors involved—the interests of shippers and carriers as well as the interests of the ports.

Whether a discrimination is undue or unreasonable is, of course, a question committed to the expert judgment of the agency, based upon an appreciation of all the facts and circumstances affecting the traffic. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303–304. It can scarcely be supposed that by enacting Section 8 of the Merchant Marine Act, 1920, Congress, without saying so, meant to foreclose the Commission from taking into account all the circumstances bearing upon the reasonableness of an alleged port discrimination. Certainly, the language of Section 8 does not require such a result. Nor is there anything in its legislative history (S. Rep. No. 573, 66th Cong., 2d Sess.; H. Rep. No. 443, 66th Cong., 1st Sess.; H. Conf. Rep. No. 1107, 66th Cong., 2d Sess.), which suggests such an intention. Significantly, the Merchant Marine Act, 1920 (41 Stat. 988), repealed a number of provisions of the Shipping Act of 1916[6] and amended a number of others,[7] without a word about the anti-discrimination provisions of Sections 15 and 16. This necessarily implies that the Commission's power and responsibility to take all factors into account in

[6] Sections 5, 7 and 8 (by § 2(a)(5) of the Merchant Marine Act, 1920, 41 Stat. 998).

[7] Sections 3, 4, 9 and 14 (by § 3 (a), (b), 18 and 20 respectively of the Merchant Marine Act, 1920, *id.* at 989, 990, 994, 996).

permitting or condemning conference practices is undiminished.

In regulating carrier practices, of course, the Commission also considers as a relevant factor the policy of encouraging port development reflected in Section 8. It expressly did so in the instant case (Pet. App. 22–29)[8] and has done so over the years in passing upon the attempts of carriers by artificial means to divert cargo from ports through which they would otherwise normally flow. See *e.g., City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 486–487; *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 and 2 U.S.M.C. 699; *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664, affirmed *sub nom. Pacific Far East Line* v *United States*, 246 F. 2d 711 (C.A.D.C.); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 55–56. Thus it weighed "the economies of transportation," the geographical relationship of the ports inside the Golden Gate to each other and to the originating territory, the impact on petitioner, the deficiencies in petitioner's proposal, and studies made by the government agencies charged with administering Section 8, which indicated that the ports inside the Golden Gate have roughly the same tributary territories. Based upon a consideration of all these factors, it properly concluded that, for the purpose

[8] In fact, the Commission took this policy into account in disallowing the rule which resulted in the diversion to Los Angeles and Long Beach, which are over 400 miles from the Golden Gate, of cargo originating in the area tributary to the ports inside the Golden Gate (Pet. App. 41–42). (See n. 4, p. 5, *supra*.)

of determining the validity of equalization with respect to the originating territory here involved, the ports inside the Golden Gate may properly be treated as serving the same geographical area, and that the policy of Section 8 is not inconsistent with the port equalization practices involved here.

There is no conflict (Pet. 9–10, 12) with *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664, affirmed *sub nom. Pacific Far East Line* v. *United States*, 246 F. 2d 711 (C.A.D.C.). That case does not hold, as petitioner asserts (Pet. 9–10), that Section 8 of the Merchant Marine Act, 1920, forecloses the Commission's discretion under the Shipping Act. The equalization rules there involved diverted cargo which originated near Portland and Seattle to ports hundreds of miles away in California and the inland transportation cost absorbed by the ocean carrier exceeded 50 percent of the entire ocean rate in some instances. The Commission observed that under the policy of Section 8 it would look with disfavor upon practices which divert cargo from the natural direction of the flow of traffic, "all other factors being substantially equal * * * ." 4 F.M.B. at 679. The court of appeals in that case, like the court in this case, affirmed on the basis of the settled principle that Congress had entrusted the Commission with broad discretion in dealing with problems under the Shipping Act and that there being a rational basis for the Commission's resolution of the problem, it could not substitute its judgment for that of the Commission. *Swayne & Hoyt, Ltd.* v. *United States*,

300 U.S. 297, 303–304; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619–621.[9]

There is plainly no basis for petitioner's suggestion that the Commission will hereafter proceed to approve all port equalization rules, regardless of circumstances. Indeed, it did not hesitate in this case to invalidate the equalization rules as applied to Los Angeles and Long Beach, (see n. 4, p. 5, *supra*), which it found to be unreasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1967.

[9] As a matter of fact, the court of appeals in the *City of Portland* case, *supra*, expressed doubts as to whether the Commission even need take the policy of Section 8 into account. It said that the Commission "could, if it was not bound to do so, examine the practices * * * in the light of that policy, and exercise its power to approve or disapprove such practices accordingly." 246 F. 2d 711, 716.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1064

STOCKTON PORT DISTRICT, *Petitioner*,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1064

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Reply Brief

This brief is in reply to the various briefs which have been filed in opposition to petitioner's Petition for Writ of Certiorari herein.

1. Petitioner's Position

Some of the respondents have purported to state petitioner's position in this proceeding in a manner which requires petitioner to set forth its actual position herein.

Petitioner's position is not that the Port of Stockton has an exclusive right to any particular cargo, but that the Port of Stockton has the *right to compete* for any cargo without the added burden of an *artificial* barrier imposed by ocean carriers which deprives the Port of Stockton of this right to compete on a *natural* basis.

Stated in another way, the Port of Stockton is entitled to have all ports compete for cargo on the basis of their respective *natural* advantages and disadvantages, free from *artificial* devices, such as port equalization, which divert from Stockton to a competing port cargo which would otherwise move over Stockton. This is in accordance with the Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867, 41 Stat. 992), and the other statutes cited in our Petition and implemented by the expenditure of federal funds for the development of ports.

2. Question Involved Solely One of Law

Some of the respondents assert that the question involved in this proceeding is one of fact or mixed fact and law, and within the exclusive discretion of the Federal Maritime Commission. This is incorrect.

The question which is actually involved here is *solely one of law*—namely, whether the federal statutes and the action of Congress to which we referred in our Petition establish a Congressional policy and intent that condemns, *as a matter of law,* the port equalization here involved and hence requires the Commission to hold such equalization unlawful, thus eliminating the Commission's discretion in this situation.

We are not asking this Court to substitute its discretion for that of the Commission, as certain of the respondents contend. We are asking the Court to determine the question of law that we have just stated, and to require the Commission to act in accordance with the law.

3. Commission Required to Comply with the Congressional Policy

The respondents contend that there is no expressed Congressional policy involved here, that any such policy is not binding on the Commission, and that the Congressional policy to which we refer is not applicable here because the Commission found that Stockton and San Francisco are in the same geographical area and that the area naturally tributary to Stockton is also naturally tributary to San Francisco.

With respect to whether there is any expressed Congressional policy, Section 551 of 33 U.S. Code (40 Stat. 1286) provides:

> "It is *declared to be the policy of the Congress** that water terminals are essential at all cities and towns located upon harbors or navigable waterways * * *"

Similarly with respect to Section 8 of the Merchant Marine Act, 1920 (46 U.S. Code 867, 41 Stat. 992), in the case of *Pacific Far East Line v. United States,* 246 F. (2d) 711 (C.A.D.C. 1957), the Court of Appeals declared:

> "* * * it is indicative of a *Congressional policy* favoring port improvement and development. * * *" (Page 716.)

Moreover, in the case of *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), the Board said of Section 8 of the Merchant Marine Act, 1920:

> "Section 8 *charges the Board with the duty* to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports." (Page 679.)

This shows very definitely that there is a Congressional policy of port development and, to that end, of the use by

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*All emphasis in quotations is supplied.

vessels of ports for freight which would *naturally* pass through them. The same policy is evidenced by Section 205 of the Merchant Marine Act, 1936 (46 U.S.C. 1115, 49 Stat. 1987), and by the expenditure by Congress of federal funds for the development of ports—to all of which we referred on pages 7 to 13 of our Petition herein.

But our opponents contend that this policy is not binding on the Commission because the functions specified in Section 8 of the Merchant Marine Act, 1920, and Section 205 of the Merchant Marine Act, 1936, were not specifically transferred to the Commission under Section 103 of Reorganization Plan No. 7 of 1961 (75 Stat. 840, 46 U.S.C.A. 1111 note), and in any event the Commission could consider the policy and then in its discretion render a decision contrary to the policy.

Sections 8 and 205, however, remained part of the law of the land, and the policy expressed therein continued to be the policy of Congress. The Commission cannot properly take action—as it has done in this case—directly contrary to the Congressional policy expressed therein, regardless of whether the investigatory functions thereunder are in another arm of the Federal Government. Moreover, the regulatory powers granted to the Federal Maritime Board by Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 46 U.S.C.A. 1111 note) were exactly the same as those granted to the Commission by Reorganization Plan No. 7 of 1961, and in *City of Portland v. Pacific Westbound Conference*, supra, the Federal Maritime Board relied on the policy expressed in Section 8 of the Merchant Marine Act, 1920, in deciding that port equalization there involved was unlawful. This was affirmed by the Court of Appeals in *Pacific Far East Line v. United States*, supra. Likewise the Board relied on Section 205 of the Merchant Marine Act, 1936, in

the case of *Encinal Terminals v. Pacific Westbound Conference*, 5 F.M.B. 316 (1957). Sections 8 and 205 are just as applicable to the Commission as they were to the Board, its immediate predecessor.

The Commission is a creature of Congress and this Congressional policy is therefore binding upon it. The Commission cannot properly pay lip service to the policy and then—as it has done here—decide exactly contrary to the policy. This was recognized by the Federal Maritime Board in *City of Portland v. Pacific Westbound Conference*, supra, where the Board stated in the quotation hereinabove set forth that Section 8 of the Merchant Marine Act, 1920, *"charges the Board with the duty"* to comply with such Congressional policy. Similarly, the Court of Appeals suggested the same duty of the regulatory agency under Section 8 in *Pacific Far East Line v. United States*, supra, as follows:

> "* * * That policy having been expressed, the Board could, *if it was not bound to do so*, examine the practices here complained of in the light of that policy, and exercise its power to approve or disapprove such practices *accordingly*. * * *" (246 F. (2d) 716.)

By these statutes and the expenditure of federal funds Congress has established the policy that the development of ports and the use of ports by vessels for the handling of cargo that would *naturally* move through them is in the public interest. The Commission should have so found here, and should have held that the diversion of cargo from the Port of Stockton by port equalization is contrary to the public interest and results in unjust discrimination and undue prejudice against the Port of Stockton, in violation of Sections 15 and 16 (First) of the Shipping Act, 1916 (46 U.S.C. 814, 815, 39 Stat. 733, 734, 75 Stat. 763). The Commission's decision and order herein should be set aside and

the case should be remanded to the Commission with instructions to amend the order to comply with such Congressional policy and to hold the port equalization unlawful in violation of such provisions of the Shipping Act, 1916. (Compare *Mitchell v. United States,* 313 U.S. 80 (1941); *Henderson v. United States,* 339 U.S. 816 (1950).)

There is nothing in the Congressional policy here involved which makes it inapplicable if the ports in question are in the same geographical area or if the area naturally tributary to one port is also naturally tributary to another port. Congress has specified that, regardless of the location of the ports, a port should be used by vessels for "freight which would naturally pass through" such port. Here the Commission found that without port equalization much of the equalized cargo would move through the Port of Stockton. (Com. Rep. 7-8, R. 1272-73, Appendix of Petition Page 19.) Consequently the Congressional policy is applicable and should have been followed by the Commission by declaring the port equalization unlawful.

4. Far-Reaching Importance of the Question Presented

The respondents contend that the Commission's decision in question has only local significance and does not involve any ports other than Stockton and ports located on San Francisco Bay. This is incorrect.

Even if the Commission's decision were said to apply only to ports which are located in the same geographical area, it would be applicable to ports located throughout the United States. For example, Portland, Oregon, and other ports on the Columbia River and Seattle, Washington, and other ports on Puget Sound could all be held by the Commission to be in the same geographical area, and consequently this decision would be applicable to port equalization between

such ports. The same would be true with respect to the different ports in Southern California, such as Los Angeles, Long Beach, San Diego and Port Hueneme. Similarly, various ports on and adjacent to the Gulf of Mexico could be held to be in the same geographical area. The same conclusion could be reached with respect to different ports on the Great Lakes, and also different ports located along various portions of the Atlantic Coast. The Commission's decision here involved would clearly be applicable to all of these respective groups of ports located throughout the United States.

But, even further, the Commission's decision here is actually applicable to every port in the United States, since the Congressional policy to which we have referred, and which the Commission should have followed in this case, prevents port equalization in every instance where the cargo in question otherwise would have moved over the port equalized against. The Commission and its predecessors have had occasion to consider the question of the lawfulness of port equalization involving the ports of New York, Baltimore, various South Atlantic ports, Mobile, New Orleans, Lake Charles, Houston, Galveston, Texas City, Beaumont and other Gulf ports, Los Angeles, Long Beach, Stockton, San Francisco and other ports on San Francisco Bay, Portland, Seattle and other ports in the Pacific Northwest in the following cases: *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500 (1941), 2 U.S.M.C. 699 (1943); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556 (1951); *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955), 5 F.M.B. 118 (1956), *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960); *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12 (1965). It is thus apparent

that the question of the lawfulness of port equalization is of nation-wide concern.

In the cases cited immediately hereinabove the Commission and its predecessors reached varying results on the question of the lawfulness of port equalization. In some instances the port equalization was held to be unlawful, and in other instances lawful. The Congressional policy to which we have referred was applied in some instances and in other instances it was not.

The question of whether the Congressional policy prevents port equalization as a matter of law thus affects every port in the United States, and is of far-reaching importance. The Supreme Court should decide this question so that the Commission's decisions involving port equalization will not vacillate in the future as they have in the past.

5. Conclusion

The Supreme Court has never considered the lawfulness of port equalization by ocean carriers, and particularly the legal effect of the Congressional policy here under consideration on such port equalization. This question should be considered by the Supreme Court. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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